Supreme Court, U.S.
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No. 99-___

In The Supreme Court of the United States

PATRICIA A. SMITH,
Petitioner,

v.

COUNTY OF CULPEPER;
CULPEPER COUNTY DEPARTMENT
OF SOCIAL SERVICES;

and

CALVIN L. COLEMAN,
Respondents.

On Petition for *Writ* of *Certiorari* to the
United States Court of Appeals for the
Fourth Circuit

PETITION FOR *WRIT* OF *CERTIORARI*

C. WAVERLY PARKER
Counsel of Record
ATTORNEY AT LAW
281 Madison Road
Post Office Box 559
Standardsville, Virginia 22973-0559
(804) 985-2252

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

156 pp

THE QUESTIONS PRESENTED FOR REVIEW

Where Plaintiff-Petitioner Patricia A. Smith, who was employed by the Defendant-Respondent Culpeper County Department of Social Services, learned just prior to or during a meeting of the local Board of such Department that about 50% of her forthcoming salary was not budgeted at all, or at least was not to be funded as contemplated by previous understanding between Smith and the Defendant-Respondent Calvin Coleman, who was Smith's immediate supervisor, and who, as Director of the Department, had practical if not also ultimate control over Smith's salary and thus had the present power to cut Smith's salary; where, in a serious conversation, Smith, upon inquiry to Coleman as to where the balance of her salary was coming from, was advised by Coleman that she could "take a road trip with . . . [him] to pay . . . [him] back"; where Smith's contemporaneous rejoinder to such comment clearly indicated that same was unwelcome to her; where the appellate court assumed, for summary judgment purposes, that Coleman's comment was a proposition; and where Smith resigned in the face of such proposition:

I. Did the Appellate Court err in affirming the District Court's grant of summary judgment to the Department on grounds that Coleman's proposition, tied to Smith's compensation in the manner stated: (1) was not actionable, even though Coleman's conduct is precisely the conduct proscribed by 42 U.S.C. 2000e-2(a)(1); and (2) did not support a claim for constructive discharge?; and

II. Did the Appellate Court err in affirming the District Court's holding that as a supervisory employee Coleman could not be an "employer" for purposes of Title VII sexual harassment liability, and in affirming the District Court's grant of summary judgment to him on that ground?

PARTIES TO THE PROCEEDING BEFORE THE COURT OF APPEALS

All parties to the proceeding before the Court of Appeals are set forth in the caption. Although the name of the County of Culpeper remains in the caption, to preserve identity with the caption of the appeal below, the County itself, as opposed to the Culpeper County Department of Social Services, was not a party to the appeal below and is not a party to this proceeding. In the District Court the County of Culpeper was without objection dismissed from this case under the circumstances recounted on page 11, infra, and in footnote 3 on that page.

There are no parent or subsidiary corporations to be listed in accordance with Rule 29.6.

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REFERENCES TO REPORTS OF THIS CASE

This case was decided by the United States Court of Appeals for the Fourth Circuit on September 9, 1999 in an unpublished per curiam opinion. The style of the case depending in the appellate court is Patricia A. Smith v. County of Culpeper, Virginia; Culpeper County Department of Social Services; and Calvin L. Coleman, Civil Action No. 99-1157. The full text of the opinion is set forth in the appendix to this Petition.

The memorandum opinion of the District Court issued on 23 December 1998, and is not reported. The full text of such opinion is set forth in the appendix to this petition.

JURISDICTION OF THIS COURT

I. Basis for Subject Matter Jurisdiction in the District Court:

This case was initially filed in the Circuit Court of Culpeper County, Virginia, to redress conduct amounting to intentional sexual discrimination unlawful under 42 U.S.C. §§ 2000e-2, 2000e-5 and 1981a. The case was removed by the defendants/ respondents to the United States District Court for the Western District of Virginia, Charlottesville Division. Subject matter jurisdiction in the District Court was based upon 28 U.S.C. §§ 1331 and 1343.

II. Basis for Jurisdiction in the Fourth Circuit:

On 23 December 1998 the District Court entered an order granting summary judgment to all Defendants then remaining in the case, the defendant Culpeper County having been previously

dismissed by consent of all the parties. Such order thus finally disposed of all claims with respect to all parties. Plaintiff timely filed a notice of appeal on 22 January 1999. Appellate jurisdiction in the U.S. Court of Appeals for the Fourth Circuit was based upon 28 U.S.C. §1291.

III. Basis for Jurisdiction in this Court:

On 9 September 1999 the U.S. Court of Appeals for the Fourth Circuit entered its judgment, by an unpublished per curiam opinion, affirming the District Court's grant of summary judgment to all remaining defendants. The appellate jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

PERTINENT EXCERPTS FROM THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

[The Full Text of Such Material is set out in the Appendix to this Petition]

There are no Constitutional provisions, ordinances or regulations involved in this case. The pertinent portions of Federal statutes involved in this case are as follows:

42 U.S.C. § 1981a. **Damages in cases of intentional discrimination in employment**

(a) **Right of recovery**

(1) **Civil rights**

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3 [42 U.S.C.A. 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)], from the respondent.

* * *

42 U.S.C. 2000e. **Definitions**

For purposes of this subchapter:

* * *

> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include [inapplicable exceptions] . . . .

* * *

42 U.S.C. 2000e-2. **Unlawful Employment Practices**

(a) **Employer practices**

It shall be an unlawful employment practice for an employer ---

> (1) to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

TERM: October 1999 to October 2000

PATRICIA A. SMITH,

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COUNTY OF CULPEPER;
CULPEPER COUNTY DEPARTMENT OF
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and

CALVIN L. COLEMAN

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

Basis for Jurisdiction in the District Court

The basis for Federal Jurisdiction in the District Court is set forth supra, at pages xi - xii, and is incorporated herein by reference. The detailed factual predicates for such jurisdiction, such as timely action on an EEOC right to sue letter, are recounted below in parts B and C of this Statement of the Case.

Pertinent Facts

This case concerns a sexual proposition tied to an employee's salary, that occurred as the culminating event of a course of conduct, which, although conceded for purposes of this appeal to be not actionable prior to that culminating event, colored and gave weight to the event which was actionable. Some familiarity with the precursor events is needful to a complete understanding of the incident in which, regardless of the situation theretofore, the respondent Calvin L. Coleman [hereinafter often "Coleman"] stepped over any conceivable line demarking nonactionable offensive conduct.

The petitioner, Patricia A. Smith [hereinafter often "Smith"], who is a woman, worked for the respondent Culpeper County Department of Social Services [hereinafter often "the Department"] until her resignation on March 14, 1997 [A-66]. At the time of that resignation, and at all times pertinent to this proceeding, the Department employed about 45 persons, 90% of whom, including Smith, were female [A-59]. The respondent Calvin L. Coleman, a male, was at all pertinent times the Director of such Department and Smith's supervisor [A-59]. Smith initially worked for the

Department part-time as an employment services worker. During Smith's tenure, Coleman promoted Smith to senior employment services worker, and later to Director of the Department's Daycare Program, which provided daycare services for working mothers, including some moving off welfare rolls [A-59]. By the time of all the events complained of in this case, Smith was working under the direct supervision of Coleman [A-59].

Coleman was at least in part subject to the supervision of a local social services board [A-59]. However, he was the chief executive officer of the entire local department [A-59], and the local board had delegated to him the power to disburse funds received from private sources for general purposes, to sign Special Welfare checks, to sign Warrant Checks, and to employ, discharge and complete evaluations of employees [A-105].

For the first several years of Smith's employment with the Department, Coleman shared his office with a secretary [A-59]. When the secretary left the Department's employ, Smith moved into Coleman's office, to make room in her old office for another worker [A-59]. From the time Coleman's secretary left until January of 1996 Coleman and Smith shared that room [A-60]. In January 1996 Smith moved to a new office, located about one mile from Coleman's office [A-60].

As Smith knows, and as is widely acknowledged by other employees, it was common for employees of the Department, including Smith and Coleman, and particularly those working on the floor where Coleman's own office was, to use there four-letter words and words that had a sexual innuendo [A-60]. Dirty jokes were also told [A-60]. Conversation in the Department office was sometimes vulgar [A-60]. Coleman, Smith and other female employees told jokes of a graphic sexual nature [A-60].

On at least two occasions, Coleman was called to task for fostering this atmosphere in the office. On the first such occasion, three or four years before the conduct complained of in this case, Coleman was informally reprimanded by a member of the local board for inappropriate bantering with a sexual innuendo. The second such occasion, in January or February of 1998, involved another employee, Cathie Buncie. Coleman, to Buncie, had quoted still another employee, Lisa Houck, as having told Coleman that a person who was interviewing with Buncie for a position that of course would be under Coleman would, if she were hired, "probably come up whenever there was a problem and sit on Chip's lap and put her tits in his face" [A-71]. Based upon this remark Buncie went to her immediate supervisor, Melia Lambert, complaining of the incident and seeking a meeting with Coleman, herself and her supervisor [A-70-73]. At the meeting Buncie expressed concern over Coleman's comment, saying that "I did not appreciate the way he spoke to me, and that I knew that there were other women in the agency who he would not . . . speak to in that manner, because of either their age . . . or --- I don't know really." [A-73]. The meeting was held, as Melia Lambert verified [A-88], and Buncie said there that "I did not appreciate it [the comments] and that if it continued, that we would have to do something about it." [A-73]. Lambert, who was Coleman's subordinate, testified that she had documented the situation because "I knew she [Buncie] was angry and I felt that if it continued, that we may need to do something differently." [A-94]. Lambert's memorandum to file appears at A-96-97.

Over the course of Smith's supervision by Coleman, he subjected her to the following:

1. On one occasion Smith wore a lace bodyshirt beneath a jumper and Coleman said to her "I like that, why don't you bend over". This happened while Coleman and Smith shared an office,

in that office, but the precise date of the comment is unknown. Smith never wore either garment again, at work or otherwise. [A-61].

2. In November of 1995 Coleman offered to let Smith and her husband use Coleman's river house for the Thanksgiving holiday, when Coleman and his family would be in Williamsburg. Coleman encouraged Smith to find a babysitter and leave the kids at home, so that Smith and her husband could go alone and "fuck their brains out". Coleman said "I want to be able to smell the sex the next time I go to the river. Take along the video camera, the tripod is in the closet at the river". This occurred in the office that Coleman and Smith shared at the Culpeper Department of Social Services. [A-61].

3. On a business trip to a professional conference in Suffolk in the summer or fall of 1995 Coleman, then alone with Smith in his wife's car, made several comments to Smith about stopping to check on the house at the river, as if he expected Smith to respond. He said, several times, "Maybe I should go check on the house, the river house" in circumstances where the parties were so far away from that house, and on such a route, that checking on the house at that time would otherwise have made no sense. These repeated comments scared Smith, because she understood them to raise the specter of a proposition while at the same time not being one. The comments offended Smith, but she was in no position to complain of them. She met each such comment by utter silence. [A-61-62].

4. Coleman would often describe Smith, in her presence and the presence of male visitors to the Department, as his "second wife", saying, as an example, "I spend more time with her than I do Carol". In Smith's mind this would leave the visitor wondering what Coleman meant and was very embarrassing to

her. The comments were always said with a smirk. In the presence of such male visitors, or with males at conferences, and often in conjunction with the last quoted comment, Coleman frequently said, referring to Smith, "She'll do what it takes to get the job done". [A-62].

5. Coleman related to Smith a comment he said was made to him by the Culpeper County Commonwealth's Attorney (Gary Close): "I hear you're having an affair with Pat Smith?" When Smith asked Coleman what his response to Close had been, Coleman told Smith that he had replied, "No, I'm over her, I'm on to someone else". When Smith then asked Coleman why Gary Close would say something like that, Coleman responded "I don't know". [A-62]. (Mr. Close does not remember any such conversation with Coleman, and does not think there ever was one [A-81-82]). Subsequently, Coleman told Smith about the similar Cathie Buncie/Andrew Lawson incident, recounted below. [A-62].

6. Coleman often made comments to Smith regarding some of Smith's subordinates, e.g.: "what a nice ass she has" (referring to Beth Wohleben); "Ooh, I like that one" or "I want her, she's a cutie" (referring to Susan King). These comments were made in Smith's presence in the office that Smith shared with Coleman. A similar comment was the experience of Pamela Riley, recounted below. [A-62].

7. On occasions when Smith appeared "stressed" to Coleman, he would tell Smith "you need to get laid, you need to be taken hard and fast". These comments were made to Smith only, in the office that she shared with Coleman. Smith would either ignore these comments or make an excuse to leave the room. [A-62-63].

8. Coleman frequently related to Smith stories of his and his wife's sexual practices. He would sometimes tell Smith that he was going home to get a "quickie" from his wife, Carol, or that Carol did this or that to him (sexually) last night. These comments were frequently made, and always in the office that Smith shared with Coleman. [A-63].

Coleman's propensities were not limited to his conversations with Smith.

As previously alluded to, Coleman told Smith of an incident involving Andrew Lawson, a former child protective services worker at the Department. [A-63]. As thus told to Smith, Coleman said to Lawson, "Why don't you find/invite someone to go to the river and I'll take Cathie Buncie. We will go for the weekend" [A-63]. However, according to Lawson, Coleman had said to Lawson "that he would like me to give him Ms. Buncie for a night. At which point I told him he would have to speak to Ms. Buncie about that, that he didn't need to approach me; he needed to approach her if he wanted to make any proposition." [A-76]. When asked by counsel whether Lawson thought Coleman was joking, Lawson responded "I don't know if the man was joking or not." [A-76].

In March of 1997, Pamela Riley, another Department employee, was paged by intercom. As Riley testified [A-79], Coleman, then standing in the doorway of one of the offices, answered the page by saying loudly enough that people several rooms away could hear it: "She'll answer the phone as soon as she gets off my lap" [A-79] This comment was made in March of 1997, after Smith had tendered her resignation but before she actually left [A-79; A-66, as to when she left].

It was against the backdrop of all of these instances, except

the last, that Coleman's conduct, if not previously illegal, crossed the line and became so. It happened thus:

Not long prior to February 19, 1997 Coleman had requested that Smith draw a budget for the day care program she administered, with such budget to reflect all of Smith's salary as coming from the day care program, an arrangement previously agreed to between Smith and Coleman and that constituted a radical departure from the way Smith's salary had previously been funded. [A-63].

Smith drew such a budget and submitted it to Coleman, who, prior to the meeting of the local board that was held on February 19, 1997, made no comment to Smith regarding the budget or its terms, even though at such meeting all budgets were to be discussed and acted upon [A-63].

When the budgets were submitted at the board meeting Smith found, to her consternation, that the day care budget reflected compensation for her in only half the amount which she was anticipating being paid (and had previously been paid). [A-64].

After the board meeting, at which the budgets were presented, Coleman came to Smith's office and she asked him "Where is the other half of my salary coming from?; because this is not the budget that I turned in to be presented." [A-64].

Coleman replied, "Well, you can take a road trip and pay me back." [A-64].

Smith understood this comment to be a sexual proposition tied to the terms of her compensation, the innuendo of such comment being that if Smith wanted all of her salary she would have to have sex with Coleman to get it. [A-64].

Smith responded to Coleman by calling him a son of a bitch and stating that he (Coleman) knew she was not like that. Coleman's only response was to back up and leave Smith's office. [A-64]. After this action was filed, Coleman initially denied ever having made any such statement, and affirmatively stated that he would have remembered making such a statement had he done so. [A-69]. As the litigation proceeded Coleman admitted that indeed he may have said this or words of like import, but he meant by them merely that Smith might need to visit the General Assembly with him in order to secure additional funding. [A-98-99].

Prior to this final incident Smith had never complained of any of Coleman's inappropriate conduct towards her, choosing instead to put up with the conduct in consideration of her friendship with Coleman and in consideration of the fact that he was not only her immediate supervisor but also the head of the Department. She still did not complain; instead, on February 28, 1997 she tendered her resignation, effective May 30, 1997. [A-64-65].

On learning of Smith's notice of resignation, Cathy Zielinski, the chairman of the local board, had a conference with Smith on March 4, 1997 [A-65]. At the conference Smith told Zielinski of Coleman's proposition to her [A-65]. Zielinski informed Smith that the Department had a policy against sexual harassment, and that the board would not tolerate this type of behavior [A-65]. She said she was going to talk to Coleman and look into the matter, and that she would contact Smith again after she (Zielinski) had done so [A-65-66]. Smith requested, and Zielinski agreed, that, pending any investigation, Smith be permitted to answer only to the board and work independently of Coleman, without contact with him [A-66].

On March 7, 1997 Smith met with Zielinski and Sandra Maskas, another member of the board [A-66]. Although Maskas

was supportive, all that was done then was that Zielinski delivered to Smith a draft of a proposed local Department grievance procedure and told Smith that she would have to resolve her difficulties directly with Coleman, because Smith was going to have to continue working with him [A-66]. This was a Friday [A-66].

On March 10, 1997, the following Monday, Smith, having reviewed the draft procedure over the weekend, and being convinced that there was no effective way for her to resolve her problem directly with Coleman, or be subject to his supervision further, tendered to Zielinski a new letter of resignation, effective March 14, 1997, the forthcoming Friday [A-66]. And that Friday was Smith's last day at work [A-66].[1]

Procedural History

On or about 3 April 1997 Smith filed a charge with the Equal Employment Opportunity Commission [hereinafter "EEOC"]. The charge alleged that Coleman --- who was at all pertinent times Smith's immediate supervisor and the Director of the Department --- had sexually harassed Smith in violation of Title VII of the Civil Rights Act of 1964.[2]

---

[1] In part, Smith made her decision to leave because she knew the grievance procedure was but a draft. For a more detailed explanation of the facts and legal issues surrounding the draft grievance procedure, see A-110.

[2] Before March 1997 ended, Patricia Smith called the Equal Employment Opportunity Commission to register the charge of discrimination upon which this case is founded. After a subsequent telephone interview with Smith shortly thereafter, the Equal Employment Opportunity Commission itself made out the document forming that charge. Although the charge did not formally name Coleman as a party respondent, his name appears in every paragraph of the charge that contains factual allegations. The EEOC's notice of such charge, appending the charge itself, was subsequently directed to Coleman and received by him as Director of such Department and it was to him as

On 30 September 1997 the EEOC issued to Smith a right to sue letter. Smith timely filed in the Circuit Court of Culpeper County, Virginia, a motion for judgment, seeking recovery against Coleman, the Department and the County of Culpeper for harassment unlawful under 42 U.S.C. §§ 2000e-2, 2000e-5 and 1981a. Trial by jury was demanded.

The defendants to such action removed it to the United States District Court for the Western District of Virginia, Charlottesville Division, and subsequently answered Smith's complaint.

On 18 March 1998 the District Court referred the action to the Magistrate Judge for submission of proposed findings of fact and recommendations for any summary disposition. During the course of discovery it became apparent that the defendant County of Culpeper was not Smith's employer for purposes of this action.[3] The County was therefore dismissed with prejudice by consent of all parties.

Upon completion of discovery, the Department moved for summary judgment on the ground, inter alia, that Smith had adduced insufficient evidence from which a jury could infer that Coleman's alleged harassment of her had been sufficiently severe and pervasive to constitute a hostile work environment. Coleman moved for summary judgment on the same grounds as the Department and on the additional grounds that supervisory

---

Director of the local Department that the notice of Smith's charge of discrimination was directed and sent.

[3] The County was dismissed because it is the Commissioner of the State Department of Social Services and the State Board of Social Services that retain ultimate authority over personnel decisions at the state and local level. The County is thus not Smith's employer in any meaningful sense for purposes of Title VII liability. See Bocke v. Fields, 999 F.2d 788 (4th Cir. 1993).

employees cannot be individually liable for sexual harassment claims, and that, even were any such claim actionable, it was barred by Smith's failure to name Coleman as a party respondent to the EEOC charge.

Smith filed a memorandum in opposition to defendants' motion for summary judgment, arguing that Smith had adduced evidence from which a reasonable person could conclude that Coleman, who had practical if not also ultimate control over Smith's salary, had conditioned a significant amount of Smith's compensation on her having sexual congress with Coleman. Such behavior, Smith argued, supported a claim for hostile work environment harassment, quid pro quo harassment, and, because Smith resigned as a result of such treatment, also supported a claim for constructive discharge. And in any event, Smith said, such behavior is actionable because it is precisely the type of conduct proscribed by 42 U.S.C. 2000e-2(a)(1).

After oral argument on the motion for summary judgment, the Magistrate proposed findings: (1) that Coleman was not named as a party respondent to the EEOC charge; (2) that, although there was abundant evidence from which a jury could infer that certain of Coleman's language and conduct was a sexual proposition, and although there was no evidence that Coleman contemporaneously acted to dispel Smith's interpretation of his conduct and language as a proposition, such language and conduct was ambiguous; and (3) that Smith had adduced evidence sufficient to create an issue of fact as to whether any affirmative defense to vicarious liability was available to the Department. [A-23-33]. The Magistrate recommended that summary judgment be granted in favor of Coleman because he was not named as a party respondent to the EEOC charge; and (2) that summary judgment be granted to the Department because Coleman's conduct, interpreted in the light most favorable to Smith, did not amount to

quid pro quo harassment, would not support constructive discharge, and, only because ambiguous, was not sufficiently severe and pervasive to create a hostile work place. [A-21-23].

Smith and the defendants objected to the proposed findings and recommendations. The objections were decided by the District Court, without benefit of oral argument, in a memorandum opinion. [A-8-20]. The District Court: (1) overruled Smith's objections to the Magistrate's report; (2) sustained defendants' objection to the Magistrate's proposed finding that there was "absolutely no testimony" supporting Coleman's interpretation of the language that Smith understood to comprise a proposition; and (3) granted the motion for summary judgment as to all defendants on the ground that Coleman's comment was ambiguous and therefore not actionable. The final order was entered on 23 December 1998. [A-6].

Smith filed her notice of appeal to the United States Court of Appeals for the Fourth Circuit on 22 January 1999. In her brief on appeal, Smith argued, inter alia: that Coleman's road trip comment could reasonably be construed by a trier of fact as a proposition offered as a condition of continued compensation at her usual rate; that it was the province of the jury to resolve any ambiguity as to the meaning of Coleman's words; and that, when Coleman's conduct is construed as a proposition, that conduct must be actionable, since it is precisely what is proscribed by 42 U.S.C. 2000e-2, regardless of whether Smith's claim is viewed as a quid pro quo claim, a hostile environment claim, or neither of these.

The Court of Appeals decided the case on September 9, 1999 in a per curiam memorandum opinion. [A-3-5]. That Court assumed, for purposes of appeal, that Coleman's comment was a proposition, but nonetheless determined: (1) that Coleman's

conduct would not support a quid pro claim because Smith failed to adduce any evidence that Coleman fulfilled the alleged threat to reduce her salary; (2) that Smith did not adduce facts sufficient to support a jury's finding that she was constructively discharged; and (3) that a jury, when viewing the totality of the circumstances from the standpoint of a reasonable person in Smith's position, could not find Coleman's isolated statement so extreme as to amount to a change in the terms and conditions of Smith's employment.

It is to these rulings by the Court of Appeals that a writ of certiorari is hereby sought.

ARGUMENT

CONSIDERATIONS SUPPORTING REVIEW ON WRIT OF CERTIORARI

A writ of certiorari should be granted because this case raises two important questions of federal law that have not been, but that should be, settled by this by this Court.

The first such question relates to what conduct is sufficient to constitute actionable sexual harassment under Title VII. In this case the sole conduct that is alleged to be actionable is a proposition uttered by Coleman that may reasonably be construed by a trier of fact to have conditioned the continuance of Smith's compensation at her usual rate upon her having sex with Coleman. Because such conduct is directly in the teeth of 42 U.S.C. 2000e-2 --- which forbids an employer from, inter alia, discriminating against an individual with respect to her compensation on the basis of her sex --- it must necessarily be actionable under the statute.

Coleman quite simply put Smith's salary on the sexual chopping block. Yet the Fourth Circuit determined that Coleman's conduct would not support a claim for any of quid pro quo harassment, hostile environment harassment or constructive discharge. *This Court should settle the question of whether a single instance of conduct which would condition an employee's compensation upon her provision of sexual favors to a supervisor with the present power to make good the threat is actionable harassment, whether or not the employee submits to such threat, and whether or not the employee resigns before the threat comes to fruition.*

The second important question of federal law that needs to be settled by this Court is whether a supervisory employee — in this case the Director and chief executive officer of the respondent Department — is an "employer" for the purposes of Title VII sexual harassment liability. During the pendency of this action below, the Fourth Circuit, in Lissau v. S. Food Serv., 159 F.3d 177 (4th Cir. 1998), overruled its previous holding in Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989), that individual liability is contemplated by Title VII. In so holding the Fourth Circuit joined all other Circuit Courts that have considered this issue. Petitioner will argue below that this holding cannot be supported without rendering nugatory certain statutory language that would mandate individual liability for "any agent" of a person that is an employer subject to Title VII. Whether or not this Court concurs with Smith's position, the issue is one that is now ripe for adjudication by this Court.

STANDARD OF REVIEW APPLICABLE TO ALL ISSUES ON APPEAL

This appeal challenges the Fourth's Circuit Court of Appeal's affirmance of the District Court's grant of summary judgment to

Coleman and the Department. The standard of review on appeal of a determination on summary judgment is identical to the standard in the District Court. The standard is de novo, and a party relying upon summary judgment has the burden of clearly establishing the nonexistence of any genuine issue of fact material to a judgment in his favor. All facts contained in affidavits, exhibits and depositions are to be viewed in the light most favorable to the nonmoving party and all inferences from such facts are to be drawn in favor of the nonmovant. Adickes v. S.H. Kress & Co., 398 U.S. 144, 153, 159-161, 98 S.Ct. 1598 (1970); First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 303, 305-307, 88 S.Ct. 1575 (1968); Cedillo v. Int'l Ass'n of Bridge, Inc., 603 F.2d 7, 10-11 (7th Cir. 1979). Moreover, Smith is entitled to have the credibility of all her evidence presumed. Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir. 1994). In particular, she is entitled, when summary judgment is at issue, to have the meaning of spoken words interpreted in the most favorable way reasonable. Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 105 S.Ct. 1504 (1985).

DISCUSSION OF ISSUES

I. **WHERE AN EMPLOYER'S DIRECTOR AND IMMEDIATE SUPERVISOR HAS THE PRESENT POWER TO CUT AN EMPLOYEE'S SALARY, AND DEMANDS SEXUAL FAVORS AS A PRECONDITION TO CONTINUED COMPENSATION AT HER USUAL RATE, SUCH CONDUCT IS NECESSARILY ACTIONABLE UNDER TITLE VII, BECAUSE IT IS PRECISELY THE CONDUCT PROSCRIBED BY 42 U.S.C. 2000e-2(a)(1) — WHETHER VIEWED AS A HOSTILE WORKPLACE CLAIM, A QUID PRO QUO CLAIM, OR NEITHER OF THESE — AND ALSO SUPPORTS A CLAIM FOR CONSTRUCTIVE DISCHARGE, WHERE THE EMPLOYEE RESIGNS IN THE FACE OF SUCH A THREAT.**

The Sexual Harassment Claim

In this case there is ample evidence from which a reasonable person could conclude that any harassing conduct perpetrated on defendant by Coleman was directed at Smith because of her sex, and defendants never contended otherwise.

There is likewise sufficient evidence upon which a reasonable person could conclude that Coleman's conduct was unwelcome, i.e. was neither invited nor solicited by Smith. See Henson v. City of Dundee, 682 F.2d 897, 903-4 (11th Cir. 1982). The District Court properly determined that Smith had met her burden with respect to this element of a sexual harassment claim.

The primary issue regarding the sufficiency of Smith's harassment claim is thus whether the conduct complained of is actionable in the first instance. When the evidence is viewed in the light most favorable to Smith, Coleman demanded sexual favors as a precondition of Smith's continued compensation at her usual rate.[4] This conduct is precisely what is prohibited by Title

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[4] For purposes of this appeal, it must be assumed that Coleman demanded sexual favors from Smith as a precondition to continued compensation at her usual rate. The trial court's grant of summary judgment to the Department was predicated on its finding that Coleman's conduct was ambiguous and that his innocent explanation of his behavior was supported by the greater weight of the evidence. In her brief before the Court of Appeals, Smith went to great lengths to argue that, for summary judgment purposes, any ambiguity in Coleman's statement must be viewed in the light most favorable to Smith, and that, properly considered on summary judgment, Coleman's comment was a sexual ultimatum conditioning Smith's continued salary at the usual rate upon her provision of sexual favors to Coleman. The appellate court apparently agreed with Smith; for in its opinion it assumed for purposes of summary judgment that Coleman's road trip statement was a proposition. However, the Court went on to summarily conclude that

> . . . a jury, when viewing the totality of the circumstances from the standpoint of a reasonable person in Smith's position, could not find

> Coleman's isolated statement so extreme as to amount to a change in the terms and conditions of Smith's employment.

This statement, given the paucity of analysis in the appellate Court's opinion, is somewhat coy, taking no express position as to whether Coleman's proposition was tied, either implicitly or explicitly, to the terms of Smith's compensation. For purposes of this appeal it must be so considered. In situations where the import of ambiguous language is at issue, it is the province of the finder of fact to determine the meaning of the ambiguous language and the province of the Court only to determine the legal effect of the meaning ascertained by the trier of fact. Thus it is said:

> The construction of words is a matter of law. However, whether words are capable of having a special meaning claimed is a question for the court, the real meaning and how the words were understood are questions for the jury. . . . And the meaning of a statement is for the jury where the statement is to be construed in light of circumstances.
>
> The meaning of words used in conversation is a question of fact for the jury where the conversation is susceptible of more than one construction.

75A Am Jur 2d 400, Trial, § 789. This principle is nicely illustrated in Simon v. Goodyear Metallic Rubber Shoe Co. 105 F. 573 (6th Cir. 1900), where, in an action for fraud and deceit, the Court observed (albeit in dictum) that the question of whether a representation made by defendant's agent was fraudulent depended on the question of what the agent meant the plaintiff to understand, which was a question for the jury. The principal that it is for the trier of fact to determine the meaning of ambiguous language is also frequently expressed in the context of jural statements. See: A. Corbin, Corbin on Contracts, § 534 (1952); Hibiscus Associates Ltd. v. Board of Trustees of Policemen and Firemen Retirement System of Detroit, 50 F.3d 908 (11th Cir. 1995); May v. Interstate Moving and Storage Co., 739 F.2d 521 (10th Cir. 1984); Lasalle Nat'l. Bank v. Service Merchandise, 827 F.2d 74 (7th Cir. 1987). If the principal is applied in a contract case — where the plain meaning of language will be honored, regardless of the true intent of the parties — it surely applies in situations where, as here, the plain meaning of language does not act as a limit if another meaning can reasonably be inferred from the circumstances.

When Congress authorized trial by jury for Title VII cases, it is presumed to have intended that the jury have the power it has in other cases —

to determine the import of ambiguous language. This issue has been considered by this Court before in strikingly analogous circumstances. In Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 105 S.Ct. 1504 (1985) this Court reversed the Fourth's Circuit's reversal of a District Court's finding as trier of fact that conduct that was both alleged to constitute sexual harassment, and that was susceptible to more than one interpretation, did in fact constitute harassment. Specifically at issue on appeal was the meaning to be ascribed to a comment made by the plaintiff that was pertinent to proof of bias of the defendants and that could be interpreted in one of two ways. The trial court found that the comment was uttered facetiously and thus did not negate the bias of the defendants. On appeal the Fourth Circuit held that the trial court's conclusion in that regard was clearly erroneous, and that the comment was seriously intended and thus undermined the bias of the defendants. This Supreme Court reversed, crediting the district court's characterization of the comment. In so holding, this Court noted that "[w]hether the trial judge's interpretation is actually correct is impossible to tell . . . We therefore cannot agree that the Judge's conclusion that the remark was facetious is clearly erroneous."

Although Anderson is a case in which the defendant-appellant city sought to overturn the findings of the court as trier of fact after trial, the principles enunciated in Anderson are just as pertinent here. If a Court is not permitted to second guess a trier of fact on the appropriate interpretation of an ambiguous comment after trial, then a court should not be able to take from the trier of fact, on summary judgment, the power to credit any reasonable interpretation of an ambiguous comment in the first instance.

Smith's interpretation of Coleman's proposition is a reasonable one. For purposes of this appeal it is assumed at least that Coleman propositioned Smith. That Coleman entreated Smith to have sex with him as a condition of her usual compensation might readily be inferred by a trier of fact from the context in which the words were spoken and from Coleman's reaction to Smith's rejoinder to his words. Coleman uttered his proposition in a situation in which Smith had just learned, contrary to previous agreement between Smith and Coleman, that one half of her salary had not been budgeted. Smith also knew that Coleman, as Director of the Department, had the power to cut her salary. Given Coleman's demeanor and the serious nature of the two antagonists' discussion, his proposition in response to Smith's enquiry about where the balance of her salary would come from might well be interpreted, as Smith in fact interpreted it, to condition her salary on submission to the proposition. In reaction to the proposition Smith called Coleman a "son of a bitch" and stated that Coleman knew she was "not like that". Coleman's reaction was merely to back away and leave. Coleman made no attempt to correct any misapprehension

VII: "[T]o . . . discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . sex . . . ." On the one hand there was the request for sex; on the other hand there was the threat to drastically reduce Smith's compensation; and finally there was a clear condition tying the two. Whether this case is considered as a quid pro quo claim or as a hostile work environment claim, or neither of these, Coleman's conduct is within the ambit of what is forbidden by the statute.

The significance of the quid pro quo and hostile work-place distinction was greatly attenuated, insofar as vicarious liability was concerned, by this Court's recent holdings in Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275 (1998) and in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257 (1998). But dicta in Burlington Industries portends a different significance for the distinction:

> We do not suggest the terms quid pro quo and hostile work environment are irrelevant to Title VII litigation. To the extent that they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in terms and conditions of employment that is actionable under

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by Smith of his comment. He merely walked away, denying nothing and leaving Smith with the impression that the sexual ultimatum was still outstanding. If such an ultimatum is actionable, then summary judgment was improvidently granted.

> Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive. . . . The case before us involves numerous alleged threats, and we express no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms and conditions of employment.

The instant case squarely raises the question left unresolved in Burlington Industries; for in this case the sole act that is actionable is an unfulfilled threat that lies in the teeth of the statute — a threat that ties demanded sexual activity to the terms of Smith's salary by a person with the present power to execute the threat.[5] Is such conduct actionable?

The policy rationales supporting liability for unfulfilled quid pro quo threats are nicely summarized in the concurring opinion of Judge Flaum in Jansen v. Packing Corporation of America, 123 F.3d 490, 499-500 (7th Cir. 1997):

> If the aim is to guard against sexual harassment, there is no justification for distinguishing between those cases in which a supervisor carries through on his threats from those cases in which the employee either submits to the supervisor's demands or in which the supervisor does not act upon his threats. Liability in this situation serves the goal of preventing such abuse from occurring by creating incentives for companies to take steps in hiring and training their supervisors. And while compensation

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[5] Since Smith resigned in the face of the threat, she was arguably constructively discharged (as will be argued infra). Smith's position is that a constructive discharge constitutes a tangible job detriment, so that this case might properly be considered a quid pro quo case despite the lack of an opportunity for Coleman to fulfill his threat to reduce Smith's salary.

> of the victim may be secondary in overall importance to the goal of deterrence, it is undeniable that an employee can be harmed by an unfulfilled quid pro quo. . . . An employee who does not submit may well undergo anxiety, distress, and loss of productivity regardless of whether the threat is carried out. Further, holding employers responsible for threats that clearly condition tangible job benefits upon the receipt of sexual favors and result in injury, even if no adverse job consequences follow, is consistent with the fact that the employee who submits to such a threat is afforded a remedy. . . . Employees who have the wherewithal to call the supervisor's "bluff" and suffer emotionally as a consequence should not have to go uncompensated, nor should a "bluff" so likely to cause harm go unrecognized by the law. The potential to succeed against a company on a claim of such an abuse of power is no "windfall".

See also Nichols v. Frank, 42 F.3d 503, 513 (9th Cir. 1994) ("[A] supervisor's intertwining of a request for sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes quid pro quo harassment"); Karibian v. Columbia University, 14 F.3d 773, 778 (2d Cir. 1994) ("The relevant inquiry in a quid pro quo case is whether the supervisor has linked tangible job benefits to the acceptance or rejections of sexual advances"). Although the quoted passage and the cited cases predate Faragher and Burlington Industries, and address the import of the distinction between quid pro quo claims and hostile work-place claims for purposes of vicarious liability, the analysis is just as telling on the issue of what should be actionable in the first instance.

Conduct is sufficiently severe and pervasive if it alters the conditions of the victim's employment. Meritor Sav. Bank v.

Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399 (1986). Though the conduct complained of must be both objectively and subjectively severe — such that a reasonable person would find the workplace hostile, and that the complainant actually perceives it so — it is not necessary that the conduct seriously affect the psychological well being of the complainant. Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367 (1993). It is enough that defendant's conduct "pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position." Steiner v. Showboat Operating Company, 25 F.3d 1459, 1463 (9th Cir. 1994). And the question of whether harassment is sufficiently severe or pervasive to be actionable under Title VII is "quintessentially a question of fact", Hartsell v. Duplex Products, Inc., 123 F.3d 766, 773 (1997); Paroline, supra, that depends on the totality of all the circumstances, Harris, supra.

When Coleman's proposition finally came, it was against a background of graphic sexual language and innuendo that had gone on for years and that had been directed at various women in the Department offices. On at least two previous occasions Coleman had been called to task for using inappropriate sexual language in the office. While Smith has admitted that she participated in some of the off-color jokes and sexual banter that occurred in the offices of the Culpeper County Department of Social Services, at least some of Coleman's comments made her exceedingly uncomfortable — e.g. his request that she go to Coleman's river house with him while they were en route to a professional conference. Though Coleman's earlier comments to Smith were likely not actionable in themselves, they reflect a course of conduct leading to his ultimate proposition to Smith. He was "testing the waters."

As Smith's immediate supervisor and as the highest executive

officer of the Culpeper County Department of Social Services, in a position where he had been expressly delegated power

> to disburse funds received from private sources for general purposes, to sign Special Welfare checks, to sign Warrant Checks, and to employ, discharge and complete evaluations of employees [A-105]

and in fact so supervised approximately 45 employees 90% of whom were female, Coleman directly conditioned a term of Smith's employment — her compensation — on Smith's having sex with him. It is difficult to conceive that Coleman's conduct did not make the workplace objectively hostile.[6] That the conduct was subjectively hostile is apparent from Smith's outraged reaction to Coleman's comment.

Coleman put Smith's salary on the sexual chopping block. Even though Smith resigned before the axe could fall, the threat itself was actionable discrimination. The conduct complained of is exactly what is forbidden by the statute. This Court should now answer the question it posed in Burlington Industries by taking this appeal and holding that where the words or conduct of a supervisory employee are reasonably and actually construed by a

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[6] Although many courts have addressed the temporal connotation of the word "pervasive", few have addressed the sense in which that word connotes permeation or diffusion throughout the work-place. Perhaps this is because there are relatively few harassment cases that are predicated on limited instances of conduct, but that are not also quid pro quo cases (in which case the "pervasive" issue is moot).

However, where, as here, a sexual ultimatum tied to terms of compensation is made by a person that is plaintiff's immediate supervisor, the Director of the Department, and the person that plaintiff would have to work with and under for as long as she continued in her job, there can be little question that the sexual ultimatum permeated, pervaded and polluted Smith's work-place. That is at least one legitimate sense in which Coleman's conduct was pervasive.

plaintiff to demand sexual favors as a condition of her usual compensation, the conduct is sufficiently severe or pervasive to be actionable where the perpetrator has the power to make good the threat, regardless of whether the plaintiff submits to the threat and regardless of whether she resigns before the threat can come to fruition. Any other result would give every supervisory employee immunity for at least his first explicit attempt to coerce sex from his subordinates. That cannot be what is contemplated by Title VII.

The Constructive Discharge Claim

In this case Smith had no effective means to redress Coleman's sexual ultimatum, and consequently resigned. This raises a triable issue of fact as to whether Smith was constructively discharged. Under the most stringent standards applied by the Circuit Courts, there are two elements necessary to a constructive discharge claim: (1) intolerability of working conditions; and (2) deliberateness of the harasser's actions. See Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985); Paroline v. Unisys Corp., 879 F.2d 100, 113-114 (4th Cir. 1989). Under the first of these elements working conditions must be so intolerable that a reasonable person faced with the plaintiff's employment circumstances would resign. Blistein v. St. John's College, 74 F.3d 1459 (4th Cir. 1996). The second element is satisfied by proof that resignation was a reasonably foreseeable consequence of the defendant's conduct. Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1355 (1995).[7]

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[7] There is now little distinction between these two elements, because the law has evolved substantially with respect to the second. At one time, the Fourth and Eighth Circuits applied a subjective test, requiring proof of an employer's intent to compel an employee's resignation. But in Martin, supra, the Fourth Circuit has followed the Eighth Circuit in Hukkanen v. International Union of Operating Engineers, 3 F.3d 281, 284 (8th Cir. 1993), in holding that

Construed in the light most favorable to her, the evidence is that Smith — though managing to tolerate for a number of years a work environment that was borderline abusive by virtue of ubiquitous offensive language, sexual innuendo and jokes by Coleman — eventually came to the day where she faced a proposition with an ultimatum: have sex with Coleman or suffer a severe reduction in her compensation. At that point, after being offered no presently effective remedy, a reasonable person might well have felt compelled to resign; and resignation was a reasonably foreseeable consequence of Coleman's sexual ultimatum. See Goss v. Exxon Office Systems Co., 747 F.2d 885 (3d Cir. 1984) (facts legally sufficient to support constructive discharge where female sales representative was verbally abused by her supervisor about her decision to become pregnant, where transfer of her lucrative sales territory to a male resulted in loss of income to her, and where her attempts to pursue in-house remedies resulted in ultimatum to accept new assignment or resign).

Coleman and the Department suggested below that Smith's resignation was not timely. But the law requires only that Smith resign within "a reasonable time after last being the subject of discrimination." Smith v. Bath Iron Works, 943 F.2d 164 (1st Cir. 1991). Smith resigned only three days after Zielinski, the chair of the Department's Board, informed Smith that she would have to work out her problems with Coleman herself and contemporaneously offered Smith a grievance procedure that was not then effective, being only a draft. Having sought relief from the entity that was purportedly in a position to discipline Coleman,

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its subjective test may be satisfied by proof that resignation was a reasonably foreseeable consequence of the defendant's conduct. While still putatively a two part test, there will be few, if any, factual scenarios in which working conditions would be so intolerable that a reasonable person would resign, but where that resignation would not also be foreseeable.

and having been told to work it out herself, Smith was faced with two choices — resign, or continue to work under Coleman, who continued to have control over her salary as well as over other terms and conditions of her employment. A reasonable person might well have felt compelled to quit under such circumstances, as Smith did a mere three days later.

For these reasons there is sufficient evidence to create a material issue of fact as to Smith's claim for constructive discharge.

II. BECAUSE 42 U.S.C. 2000e ET SEQ. PROVIDES THAT "ANY AGENT" OF AN EMPLOYER HAVING 15 OR MORE EMPLOYEES MAY BE LIABLE FOR SEXUAL HARASSMENT, SMITH IS NOT BARRED FROM SEEKING RECOVERY AGAINST THE DEFENDANT COLEMAN IN HIS INDIVIDUAL CAPACITY.

At the time of the Magistrate's recommendation on summary judgment, the law of the Fourth Circuit was that "[a]n individual qualifies as an 'employer' under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment." Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989). Following the Magistrate's recommendation, but prior to entry of the District Court's final order, the Fourth Circuit, by its decision in Lissau v. S. Food Serv., 159 F.3d 177 (4th Cir. 1998), joined all other circuits that have considered this point[8], holding that a

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[8] See, e.g.: Dici v. Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996); Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. 1994); Williams v. Banning, 72 F.3d 552, 554 (7th Cir. 1995); Smith v. St. Bernards Regional Medical Ctr., 19 F.3d 1254, 1255 (8th Cir. 1994); Haynes v. Williams, 88 F.3d 898, 901 (10th Cir. 1996); Smith v. Lomax, 45 F.3d 402, 403 n.4 (11th Cir. 1995); Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir. 1995).

supervisory employee cannot be an "employer" for purposes of liability under Title VII. The holding in Lissau, and the like holdings of other circuit courts that have considered the issue of individual liability under Title VII, is erroneous.

42 U.S.C. 2000e-2 forbids discrimination by employers. And 42 U.S.C. 2000e(b) defines the term "employer" to mean:

> . . . a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . . [Emphasis supplied.]

42 U.S.C. 2000e, read together with the definition in 42 U.S.C. 2000e(b), would thus forbid discrimination by any agent of an employer having fifteen or more employees during the requisite time periods. It is an axiomatic principle of statutory construction that every word must be given effect, and yet the Lissau court's construction of these statutes renders nugatory the words "and any agent".

The courts that have denied individual liability would account for the definitional words "and any agent" as but "an unremarkable expression of respondeat superior" (see Lissau, supra); and would deny individual liability on what amounts to a policy ground that there should be no individual liability where there is no liability for persons having less than fifteen employees. But the statutory language is not so easily dismissed and the policy rationale is not sound.

In Burlington Industries this Court interpreted Title VII's definition of the term "employer" to include "any agent" of such employer as explicit legislative instruction to resolve issues of

vicarious liability in accord with principles of agency jurisprudence. But it cannot properly be inferred that this inclusion has no other significance. To the contrary, if Congress had not intended individual liability for agents of employers, the inclusion of the words "and any agent" would have been utterly redundant; for how could a non-individual "person having fifteen or more employees" ever be liable except by the acts of its individual agents? It cannot be presumed that Congress used redundant language; and yet the words "and any agent" are mere surplusage unless they are read to give rise to individual liability. Moreover, if what Congress intended was to create a tort in which the principles of agency give rise to vicarious liability, as Burlington Industries and Faragher teach, it is difficult to conceive that, contrary to principles of agency, the tort created would render the principal liable without also rendering liable the agent whose acts give rise to the tort.

Because the statutory language itself clearly provides for individual liability, extrinsic considerations of policy and the overall statutory scheme should never be reached in determining the meaning of the statute. But it is worth noting there is no reason that Congress could not have made a considered judgment that small work environments with less than fifteen employees would not be subject to the Act, but that larger work environments, including supervisory personnel in their individual capacities, would be subject to the Act.

The holding in Paroline was the proper holding, and in the instant case uncontested facts establish the threshold criteria set out in Paroline and its progeny[9] for Coleman's individual liability.[10]

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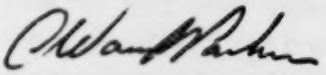
[9] Such criteria include: (1) that the employee serves in a supervisory capacity and exercises a significant degree of control over the plaintiff, including the ability to hire, fire, or establish the conditions of employment; (2) the harassment is sexual (i.e. the plaintiff alleges a sexual quid pro quo theory of disparate

CONCLUSION

For the foregoing reasons, the Petitioner Patricia A. Smith prays that in this case certiorari issue to the judgment of the United States Court of Appeals for the Fourth Circuit, and that in due course such judgment be reversed and the case be remanded to the Court of Appeals for further proceedings consistent with the judgment of this Court, with costs in this Court to be assessed in favor of Smith.

Respectfully submitted,



C. Waverly Parker, Esquire
Admitted to the Bar of this Court
on 26 August 1971
281 Madison Road
P.O. Box 559
Stanardsville, Virginia 22973
(804) 985-2252

Counsel of Record
for the Petitioner
Patricia A. Smith

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treatment or a hostile environment based on sexual harassment); and (3) the sexual harassment is conducted by the supervisor for his own benefit and not for that of the employer. Douglas v. Dabney S. Lancaster Community College, 990 F.Supp. 447, 458 (W.D.Va. 1997). See also: Blankenship v. County of Warren, 918 F. Supp. 970 (W.D.Va. 1996); and Frye v. Virginia Transformer Corp, No. 95-0399-R, 1995 WL 810018 (W.D.Va. Nov. 29, 1995).

[10] In the event that this issue is resolved favorably to Smith, the issue of whether Coleman's individual liability was foreclosed by Smith's failure to name him as a party to the EEOC charge should be determined on remand.

No. 99-___

In The Supreme Court of the United States

PATRICIA A. SMITH,

Petitioner,

v.

COUNTY OF CULPEPER;
CULPEPER COUNTY DEPARTMENT
OF SOCIAL SERVICES;

and

CALVIN L. COLEMAN,

Respondents.

On Petition for *Writ* of *Certiorari* to the
United States Court of Appeals for the
Fourth Circuit

APPENDIX TO PETITION FOR *WRIT* OF *CERTIORARI*

C. WAVERLY PARKER
Counsel of Record
ATTORNEY AT LAW
281 Madison Road
Post Office Box 559
Standardsville, Virginia 22973-0559
(804) 985-2252

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PATRICIA A. SMITH Plaintiff-Appellant, v. COUNTY OF CULPEPER, VIRGINIA; CULPEPER COUNTY DEPARTMENT OF SOCIAL SERVICES; CALVIN L. COLEMAN Defendants-Appellees	No. 99-1157

Appeal from the United States District Court
for the Western District of Virginia, at Charlottesville.
James H. Michael, Jr., Senior District Judge
(CA-98-3-3)

Submitted: August 24, 1999

Decided: September 9, 1999

Before MURNAGHAN, LUTTIG, and KING, Circuit Judges

Affirmed by unpublished per curiam opinion.

COUNSEL

C. Waverly Parker, Sr., Stanardsville, Virginia, for Appellant. Robert A. Dybing, John A. Gibney, Jr., SHUFORD, RUBIN & GIBNEY, Richmond, Virginia, for Appellees.

OPINION

PER CURIUM:

Patricia A. Smith appeals from the district court's order granting summary judgment in favor of Appellees in her Title VII action, 42 U.S.C. § 2000e-2(a)(1) (1994). We have reviewed the record, find no reversible error, and affirm.

Smith first claims that the district court erred when it granted summary judgment to Appellee Calvin Coleman. Coleman was not individually liable for violations of Title VII; thus, the district court properly granted summary judgment on this claim. *See Lissau v. Southern Food Serv., Inc.*, 159 F.3d 177, 180 (4th Cir. 1998).

We further find that summary judgment was properly granted to Appellees County of Culpeper, Virginia, and to the Culpeper County Department of Social Services. We assume for the purposes of this appeal that Coleman's ambiguous "road trip"

statement was a proposition. Even assuming that Smith properly raised her quid pro quo claim before the district court, Appellees were entitled to summary judgment because she failed to adduce any facts showing that Coleman fulfilled the alleged threat to reduce her salary. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, _____, 118 S. Ct. 2257, 2264- 65 (1998); *Brown v. Perry*, ____ F.3d ____, 1999 WL 504814 (4th Cir. July 14, 1999) (No. 97-1501). Further, we find that Smith did not adduce facts sufficient to support a jury's finding that she was constructively discharged. *See Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 262 (4th Cir. 1996); *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985). We also find that a jury, when viewing the totality of the circumstances from the standpoint of a reasonable person in Smith's position, could not find Coleman's isolated statement so extreme as to amount to a change in the terms and conditions of Smith's employment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, ____, 118 S. Ct. 2275, 2283 (1998).

Accordingly, we affirm the order of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

Order of the United States District Court for the Western District of Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

PATRICIA A. SMITH Plaintiff, v. COUNTY OF CULPEPER, *et als.*, Defendants.	))))))))	CIVIL ACTION NO. 98-003-C **ORDER** JUDGE JAMES H. MICHAEL JR.

For the reasons stated in the accompanying memorandum opinion, it is hereby

ADJUDGED AND ORDERED

that:

1. The Magistrate Judge's Report and Recommendation shall be, and it hereby is, adopted in part.

2. Defendants' motion for summary judgment shall be, and it hereby is, GRANTED.

3. Plaintiff's objections to the Magistrate Judge's Report and Recommendation are overruled.

4. Defendants' factual objection to the Magistrate Judge's Report and Recommendation is sustained.

5. This action shall be, and it hereby is, dismissed and

stricken from the docket of this court.

The Clerk of the Court hereby is directed to send a certified copy of this Order to all counsel of record.

ENTERED: /S/ James H. Michael, Jr.
Senior United States District Judge

23 December 1998
Date

Opinion of the United States District Court for the Western District of Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

PATRICIA A. SMITH Plaintiff,	)	CIVIL ACTION NO. 98-003-C
v.	)	MEMORANDUM OPINION
COUNTY OF CULPEPER, *et als.*, Defendants.	)	JUDGE JAMES H. MICHAEL, JR.

Pursuant to 28 U.S.C. §636(b)(1)(B), this court referred the above-captioned case to the Honorable B. Waugh Crigler, United States Magistrate Judge, for the proposed findings of fact and recommended disposition, subject to review by this court. On October 29, 1998 the Magistrate Judge filed his Report and Recommendation ("R&R"), granting defendants' motion for summary judgment. Defendants filed an objection to one factual recitation in the Magistrate's R&R on November 12, 1998. Plaintiff filed its objection on November 9, 1998. Said objection having been timely and appropriately lodged, this court must undertake a *de novo* review of the case. *See Orpiano v. Johnson*, 687 F.2d 44, 48 (4th Cir. 1982). After a thorough examination of the parties' objections, the supporting memoranda, the applicable law, the documented record, and the R&R, the court overrules the plaintiff's objections and adopts the recommendation that defendants' motion for summary judgment be granted.

I.

Plaintiff Patricia A. Smith ("Smith") worked for defendant Culpeper County Department of Social Services ("DSS") beginning in January 1988 and ending with her

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resignation March 14, 1997. Defendant Calvin Coleman ("Coleman") is Director of DSS and was Smith's supervisor throughout her employment at DSS. Smith acknowledges that the office atmosphere at DSS was characterized by frequent use of adult humor, sexual innuendo and sexual banter. She herself engaged in this behavior, notably referring frequently to a portion of Coleman's anatomy using a crude colloquialism.

Although plaintiff acknowledges in her memorandum in opposition that all but one of the incidents set forth in her complaint are "probably not actionable," she contends that these incidents demonstrate a pattern of conduct culminating in the ultimate sexual proposition which caused her to resign. The incidents enumerated in the complaint will not be recited here. For the most part, they consist of remarks and sexual innuendoes by Coleman, at times referring to Smith's sexual relations with her own husband. Only a few of the comments complained of occurred within the limitations period prior to Smith's filling with the EEOC.[1] Coleman also allegedly made inappropriate

[1]Neither side cites the recent Fourth Circuit holding that because Virginia's Council on Human Rights is a "deferral agency" with authority to seek relief from unlawful employment practices, claims in Virginia are subject to the 300-day limitations period rather than the 180-day period previously applied. *See Tinsely v. First Union Nat'l Bank*, 1998 WL 557166 (4th Cir. 1998). However, whether the 180-day or 300-day period is applied in this case has little effect on Smith's claim because the single incident at its core occurred well within either period.

comments to Smith about other female employees and made comments about Smith to others in the office. None of the alleged incidents involved any physical contact or any direct proposition that Smith have sex with Coleman. Ultimately, only one comment forms the basis of the suit. In February 1997 when Smith asked Coleman why he had amended her proposed budget for her department so that only half of her salary was shown as coming out of available funds, he responded that the rest

of her salary had been budgeted and that Smith could "pay him back" by taking a "road trip" with him. She interpreted this comment to be a sexual proposition.

Defendants do not dispute that these incidents may have happened. Rather, defendants point out that most of these incidents were merely part and parcel of the office atmosphere fostered as much by Smith as Coleman and that Smith never complained about that atmosphere prior to the "road trip" comment. Smith and Coleman often spoke candidly about their marriages and their sexual relationships with their spouses. The "road trip" comment itself, according to the defendants, can be more reasonably interpreted to propose a trip to Richmond to ask the Virginia General Assembly for additional funding. Defendants cite statements in depositions of other DSS employees to the effect that Coleman often spoke in similar terms when referring to his frequent trips to Richmond to lobby for funds.

In her complaint, Smith claims that on February 25, 1997, she informed DSS through Kathy Zielinski of the DSS Board that she felt Coleman had sexually harassed her. However, in a February 28, 1997 letter of resignation, Smith made no mention of any harassment and gave over three months notice to Coleman that her last day of work would be May 30, 1997. Coleman entreated Smith not to resign. In plaintiff's "Statement of Genuine

Issues for Resolution at trial," paragraph XXIX states that it was at a March 4, 1997 conference set up by Zielinski that Smith told Zielinski of the alleged sexual proposition. Zielinski told Smith at that time that sexual harassment would not be tolerated and an investigation would ensue. Three days later, Smith met again with Zielinski and another board member, Sandra Maskas

and received a copy of the department's draft grievance procedure.[2] Another employee, Bob Royster, also offered his support for Smith. However, after reviewing the grievance procedure, Smith tendered a new letter of resignation, effective March 14, 1997. Smith resigned in what she terms a constructive discharge, though she admits that her lack of patience for office politics also contributed to her decision. On April 3, 1997 Smith filed her complaint with the EEOC naming the DSS as the employer who discriminated against her and referring to Coleman's "road trip" comment on February 28, 1997 as the sexual harassment which caused her to resign. On September 30, 1997 the EEOC issued a right to sue letter in Smith's case.

This action was filed in December 1997 in the Circuit Court of Culpeper County. Defendants filed their notice of removal to this court on January 7, 1998, basing jurisdiction on 28 U.S.C. §§1331 and 1343 and consent of all parties to removal. Defendants subsequently filed their answer on January 15, 1998.

II.

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[2]The procedure was a draft because as of July 1996, the General Assembly removed local departments of social services from coverage under the state grievance procedure, leaving such departments to develop their own procedures. Plaintiff makes much of this draft status while defendants assert that because board members offered the draft procedure to Smith, they intended that she would be able to utilize it.

A. The Standard for Summary Judgment

Summary judgment is appropriate only after the parties have had reasonable opportunity to conduct discovery. Under Fed. R. Civ. P. 56(a)-(b), both claimants and defendants are allowed to move for summary judgment. According to Fed. R. Civ. P. 56(c),

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summary judgment should be granted "if the pleadings, depositions, answer to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In considering a motion for summary judgment, the court should view the evidence and affidavits of the parties in light of the pleadings, drawing all facts and inferences in favor of the non-moving party. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); *Charbonnages de France v. Smith*, 597 F.2d 406 (4th Cir. 1979). The non-moving party is entitled to have the credibility of all its evidence presumed. *See Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 1018 (1991). Before the non-moving party must face the burden of demonstrating the existence of triable issue of fact, the movant must meet its burden of showing the absence of evidence to support the non-movant's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *see also Cray Communications, Inc. v. Novatel Computer Systems, Inc.*, 33 F.3d 390, 393-394 (4th Cir. 1994).

However, a party opposing a motion for summary judgment that is well-supported "may not rest upon mere allegations or denials of the adverse party's pleadings, but the adverse party's

response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). There must be more than a "scintilla" of evidence to support the non-movant's case. *See Anderson*, 477 U.S. at 248. Rather, the evidence must be sufficient to "return a verdict" at trial for the party opposing the entry of judgment. *See id.* The non-moving party "cannot create a

genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 477 U.S. 242, 248 (1986). Moreover, the existence only of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion. *See Thompson Everett, Inc. v. National Cable Adv.*, 57 F.3d 1317, 1323 (4th Cir. 1995) ("[I]f the evidence is 'merely colorable' or 'not significantly probative,' it may not be adequate to oppose entry of summary judgment.").

B. Summary Judgment for Defendant Coleman

The Magistrate Judge granted summary judgment to the defendant Coleman on the grounds that Coleman was not Smith's employer, DSS was, and therefore Coleman could not be liable for sexual harassment in his individual capacity. The Magistrate Judge also reasoned that because Smith failed to name Coleman in her EEOC complaint, Coleman could not be the subject of her suit in federal court.

The Magistrate Judge's recommendation that Coleman be granted summary judgment finds solid support in Fourth Circuit precedents. In particular, the recent decision in *Lissau v. S. Food*

Serv. makes clear that supervisors are not liable in their individual capacities for Title VII violations. 159 F.3d 177 (4th Cir. 1998). The facts in *Lissau* bear a striking resemblance to the facts of this case. The plaintiff in Lissau brought a title VII claim against her former supervisor and former employer claiming that her supervisor had behaved inappropriately toward her during her employment, making provocative statements and sexual innuendos. *See id.* at 179. In affirming the lower court's grant of summary judgment for the defendant supervisor, the Fourth Circuit announced it was "join[ing]

other circuit courts and conclud[ing] that supervisors are not liable in their individual capacities for Title VII violations." *Id.* at 180.

Because the law in the Fourth Circuit is now clear in interpreting Title VII to foreclose individual liability for supervisors, the court need not reach plaintiff's claim that she has recourse to the available exceptions to the so-called naming requirements of Title VII.[3]

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[3] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, provides that a civil action may be brought in federal court against respondent named in the charge" filed with the EEOC. 42 U.S.C. §2000e-5(f)(1). The Fourth Circuit clearly recognizes only one exception to the naming requirement where there is "no functional distinction" between the defendant in the civil action and the respondent named in the EEOC charge. *Harris v. Norfolk & Western Ry. Co.*, 720 F.Supp 567, 569 (W.D.Va. 1989) (citing *Alavarado v. Bd. of Trustees*, noting additional factors in the case such as plaintiff's limited command of English and lack of control over how the EEOC charge was filled out). In addition to this so-called legal identity exception to the naming requirement, some other circuits and some district courts within the Fourth Circuit have approved a substantial identity exception to the naming requirement. *See e.g., Mayo v. Questech, Inc.*, 727 F.Supp. 1007 (E.D.Va. 1989, Ellis, J.), *Kouri v. Todd*, 743 F.Supp. 448 (E.D.Va. 1990, Ellis, J.), *Brewster v. Shockley*, 554 F.Supp. 365 (W.D.Va. 1983, Glen M. Williams, J.), *Afande v. Nat'l Lutheran Home for the Aged*, 868 F.Supp 795 (D.Md. 1994,

C. Summary Judgment for Defendant DSS

The Magistrate Judge recommended granting summary judgment for DSS because plaintiff had not established the elements of a prima facie case of a hostile work environment claim. Specifically, the Magistrate Judge relied on *Hopkins v. Baltimore Gas & Elec. Co.* in determining that the behavior alleged in this case was not severe or pervasive enough to support a claim of hostile work environment sexual harassment. *See* 77 F.3d 745, 753 (4th Cir. 1996), *cert denied*, 117 S.Ct. 70 (1996). [7]

The necessary elements of a hostile work environment claim are: (1) that the plaintiff was harassed because of her sex; (2) that the harassment was unwelcome; (3) that the harassment was sufficiently severe or pervasive to create an abusive working environment; (4) that there is a basis for imputing employer liability. *See Hartsell v. Duplex Products, Inc.*, 123 F.3d 766, 722 (4th Cir. 1997) (quoting *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 142 (4th Cir. 1996)). The first element was not contested, but defendants argued in their motion for summary judgment that plaintiff's case fails to show elements two through four.

Several courts have construed the second element to bar claims brought by parties who willingly participated in the vulgar or sexually suggestive behavior in the workplace. In *Reed v. Shepard*, for example, a district court granted a directed verdict for defendant in a claim by a female jailer who used foul language, told dirty jokes, and reciprocated the sexual banter prevalent in her workplace. *See Reed*, 939 F.2d 484, 486-87 (7th Cir. 1991). Also in *Reed*, however, the Seventh Circuit quoted

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Williams, J.).

the Supreme Court's statement that "the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact." *Reed*, 939 F.2d at 491 (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)). Thus, on a motion for summary judgment, plaintiff's contention that Coleman's statements to her were unwelcome and made her uncomfortable must be accepted as true, leaving the issue of unwelcomeness to the jury. Plaintiff's own participation in sexually suggestive behavior is relevant in determining the totality of the circumstances, but is not, in and of itself, determinative. *See Meritor*, 477 U.S. at 69.

Whether allegedly harassing behavior was sufficiently severe or pervasive to support

a claim can be more readily determined at the summary judgment stage because this element includes both an objective and a subjective requirement. Allegedly harassing conduct is only sufficiently severe or pervasive if it "affects a term, condition or privilege of employment." *Id.* at 67. For example, a "mere utterance...which engenders offensive feelings in an employee" would not significantly affect the working environment so as to constitute a Title VII violation. *See id.* To be actionable under Title VII, conduct must not only lead to plaintiff's subjective perception that the environment was abusive, but must create an objectively hostile or abusive environment. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993).

The objective determination comprises consideration of a variety of factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it

unreasonably interferes with an employee's work performance." *Id.* at 23. To satisfy the burden of making a prima facie claim, plaintiff must show not just that there was harassment, but that it is the actionable kind, meaning that it was sufficiently severe or pervasive to create an objectively hostile or abusive workplace. *See Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 753 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 70 (1996). "Title VII does not attempt to purge the workplace of vulgarity." *Id.* (quoting *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995)). In *Hopkins*, the Fourth Circuit approved the district court's grant of summary judgment in favor of defendant where the conduct relied on by the plaintiff was "temporally diffuse, ambiguous, and often not directed specifically at [plaintiff]," and was "sexually neutral or, at most, ambiguous." *Id.*

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All but one of these incidents related by plaintiff in her complaint fail to rise to the level of actionable conduct because plaintiff herself admits she was not bothered by them, so the subjective aspect is lacking. In conversations with other DSS employees prior to the "road trip" comment, Smith acknowledged the foul language and sexually explicit banter, saying, "that goes on all the time on our floor...that's just the way we operate, it is a very friendly relaxed kind of place." Plaintiff's Depo. at 197-198. Plaintiff's opposition memorandum acknowledges that the incidents other than the "road trip" comment are probably not actionable.

The "road trip" comment, while it may have the requisite subjective offensiveness element, fails to satisfy the requirement that conduct must be severe or pervasive enough to create an objectively hostile or abusive environment. Coleman's comment about the "road trip" was, like the conduct in *Hopkins*, ambiguous

at most.[4] Others in the workplace would have construed it as a reference to a trip to Richmond to ask the General Assembly for additional funding, not the sexual proposition that Smith understood.[5] Even if it was a

sexually suggestive comment, it was merely one offensive utterance, without any accompanying physical contact or threat, and therefore, under the *Harris* analysis, fails to rise to the level of being sufficiently pervasive and severe.

Defendants' explanation that the "road trip" comment referred to a fundraising trip to Richmond is not only reasonable, but that interpretation is supported by the greater weight of the evidence. Plaintiff's memorandum claims that Smith's understanding of the "road trip" comment as a sexual proposition was a reasonable one, but points to no evidence to counter the overwhelming weight of testimony from several other DSS employees indicating that this comment most likely referred to a fundraising trip to Richmond. In addition, the minutes from the February 19, 1997 board meeting at which the budget was discussed make clear that Coleman had no intention of changing

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[4]Plaintiff attempts to distinguish *Hopkins* by claiming that its holding applies only to ambiguous *conduct*, not ambiguous *language* such as the "road trip" remark. However, as defendants point out, plaintiff herself explained that it was not the language Coleman used in making the "road trip" remark that offended her, it was his tone and smirk. Therefore, even if the court accepted plaintiff's reading of *Hopkins*, it would still conclude that the behavior in this case, like that in *Hopkins*, was too ambiguous to support s claim of sexual harassment.

[5]It is this point which inspired defendants' only "factual" objection to the Magistrate's findings. While the Magistrate stated that there was no support for defendants' interpretation of the "road trip" comment as a reference to going to Richmond to ask for state funding, there are actually several statements in depositions of other DSS employees which support the defendants' interpretation of the remark.

Smith's salary, he merely intended to use a different mix of funding sources to constitute the entire salary amount than had previously been planned.[6]

In fact, Coleman lobbied for Smith in the face of other employee's arguments that too much of a particular grant amount was going toward Smith's salary. In light of all the evidence that plaintiff unreasonably construed Coleman's remark as a sexual proposition, it cannot be said that plaintiff has met her burden of alleging conduct that is sufficiently severe and pervasive to be actionable.

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It is therefore appropriate to grant defendants' motion for summary judgment on the basis that plaintiff has failed to show all elements of a prima facie case of hostile work environment sexual harassment. Because the relevant conduct - one comment about a "road trip" - does not rise to the level of being sufficiently severe or pervasive to create an objectively hostile and abusive workplace, plaintiff's hostile work environment claim cannot survive summary judgment.

The court need not inquire further into the adequacy of plaintiff's proof of the fourth element of a hostile work environment claim. Nor need the court address the availability of the affirmative defenses announced by the Supreme Court's recent

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[6]The relevant language at page 2 of the minutes, under the heading "Day Care Grant," is as follows: Ms. Carolyn Smith asked about the $12,000 which would go toward Ms. Pat Smith's [plaintiff's] salary. Mr. Coleman stated that Ms. Smith's salary *would not be increased*, but the grant funds would be cost-allocated to her salary. For example, Ms. Smith's salary was now covered 50 percent by DSS funds and 50 percent by Day Care. He felt using grant funds would be appropriate since Ms. Smith would be on call 24-hours a day." [emphasis added]

decision in *Burlington Indus. v. Ellerth* and *Faragher v. City of Boca Raton*. 118 S.Ct. 2257 (1998) and 118 S.Ct. 2275 (1998). The court will also decline to reach the merits of plaintiff's constructive discharge claim.

III.

Because the court finds that plaintiff has not adequately met all four of the required elements of a prima facie case of hostile work environment harassment, it will grant the defendants' motion for summary judgment and adopt the Magistrate Judge's Report and Recommendation.

An appropriate Order this day shall issue.

ENTERED: /S/ James H. Michael, Jr.
Senior United States District Judge

23 December 1998
Date

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Report and recommendation of the Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

PATRICIA A. SMITH Plaintiff,	)	CIVIL ACTION NO. 98-003-C
v.	)	REPORT AND
COUNTY OF CULPEPER *ET. AL.*,	)	RECOMMENDATION By: B. WAUGH CRIGLER
	)	U.S. MAGISTRATE
Defendants.	)	JUDGE

Upon the proposed findings and conclusions set forth from the bench on October 19, 1998, the written transcript of which shall be incorporated herein when produced, it is

RECOMMENDED

that Defendant's September 17, 1998 motion for summary judgment should be GRANTED.

The Clerk is directed to immediately transmit the record in this case to the Hon. James H. Michael, Jr., United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note objections, if any they may have, to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C §636(b)(1)(B) as to factual recitation or findings as well as to the

conclusions reached by the undersigned may be construed by any reviewing court as a waiver of objection.

The Clerk of the Court hereby is directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTERED: /s/ B. Waugh Crigler
U.S. Magistrate Judge

29 October 1998
Date

Transcription of orally rendered proposed findings and recommendation of the Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

* * * * * * * * * *

PATRICIA A. SMITH	*	CIVIL ACTION NO. 98-3
	*	
Plaintiff,	*	
	*	
v.	*	October 19, 1999
	*	2:00 p.m.
CULPEPER COUNTY	*	Charlottesville, Virginia
DEPARTMENT OF	*	
SOCIAL SERVICES and	*	
CALVIN L. COLEMAN	*	
	*	
Defendants.	*	

* * * * * * * * * *

TRANSCRIPT OF PROPOSED FINDINGS AND CONCLUSIONS BEFORE THE HONORABLE B. WAUGH CRIGLER UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: C. WAVERLY PARKER, ESQ.
P.O. Box 559
Stanardsville, VA 22973-0559

For the Defendants: Shuford, Rubin & Gibney, PC
ROBERT A. DYBING, ESQ.
P.O. Box 675
Richmond, VA 23218-0675

Proceedings recorded by electronic recording, transcript produced by computer.

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THE COURT: This action is before the Court on the Defendant's motion for summary judgment that was filled on September 17 and the opposition thereto. The matter has been referred to this Court under 28 U.S.C. Section 636(b) (1) (B) to render to the presiding District Judge a report setting forth the appropriate findings, conclusions and disposition of the motion.

The evidence in this case, in many respects, is undisputed. In fact, this is one of those few cases where most of the facts are undisputed. The question may arise as to the inference that is to be drawn from the facts and that's where the dispute arises, whether they can be drawn legally, number one, and if so, what is the legal effect.

The evidence shows that Patricia Smith worked at the Culpeper County Department of Social Services beginning in January 1988, ending with her resignation in March of '97. Calvin Coleman was, and I take it, still is, the director of the Department of Social Services and was Ms. Smith's supervisor throughout the relevant period in this case.

The plaintiff herself acknowledges the allegations and the evidence that the office atmosphere at the Department of Social Services was characterized by frequent adult humor, sexual

innuendo and sexual bantering. She herself engaged in some of that, notably by placing a jar on her desk with a certain sign on it that indicated what was in the jar

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and I'm not going to repeat it here. The evidence clearly indicates what that is. It was portions of anatomy of the Defendant.

Although the Plaintiff acknowledges that all but one of the incidents set forth in her Complaint are actionable, she contends here that these incidents demonstrate a pattern of conduct culminating in the ultimate event that has been argued as the touchstone of this case.

Let me just give some historical background.

The evidence in this case shows that in November 1993, Coleman encouraged the Plaintiff to go to his river house with her husband and engage in sexual activity and invited her to videotape that activity and offered a camera for those purposes, telling her that he wanted to experience the effects of all that.

That's enough to make you throw up.

In late 1995 -- and by the way, that's a footnote. In late 1995 while travelling with Smith to a conference, Coleman mentioned stopping at his river house which Smith interpreted as an innuendo that he wanted her to engage in some type of activity, sexual activity. That was in '95. Also in the fall of '95, Coleman commented to the Plaintiff that he liked her outfit, a lace body shirt with a jumper, and asked her "why don't you bend over." Again, in the fall of 1995, Coleman reported to Smith a conversation he claimed

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to have had with a public official in which he said he had gotten over Smith and was moving on to someone else. I believe that public official was the Commonwealth's Attorney and the evidence in the case does not confirm or dispel it from the Commonwealth's Attorney's standpoint. He doesn't remember ever having the conversation.

On several occasions, some during the period -- by the way, there was issued a 120-day period in here and there may be a question of whether the availability of human rights process has extended that to 300, but that's not an issue here to resolve. But sometime during the 120-day period, Coleman referred to Smith as his second wife, saying that he spent more time with her than his own wife.

Again, there were other comments about Coleman telling others, referring to Smith that she would do what it takes to get the job done, allegedly smirking and implying sexual involvement with Smith.

Eventually, in February of 1997 when the proposed budget for the department was being discussed, there was an indication that only half her salary had been showing to come out of available funds and Mr. Coleman was queried about that and he responded to the Plaintiff that the rest of her salary had been budgeted and that Smith could, "you can take a road trip and pay me back" or words essentially to the same effect and the difference in the description of

those words has not been an issue before the court here.

Now, essentially, the Defendants do not dispute that any of these incidents happened and there were others that I haven't

recited that are in the record, rather than pointed out that most of these incidents were merely part and parcel of an office atmosphere that was fostered as much by the Plaintiff as it was by the Defendant, Coleman, in this case and that she never complained about the atmosphere prior to the road trip incident.

Smith and Coleman often spoke candidly about their marriages to one another -- there's no dispute over that -- and their sexual relationship with their spouses. The road trip comment itself, according to the Defendant, can be more reasonably interpreted to propose a trip to Richmond and at the very bottom of the Defendants' argument, they believe that the road trip comment was ambiguous subject to multiple interpretations and therefore not actionable in and of itself.

Now, there's a number of other bits of evidence that are relevant to some of the issues that are raised in this case, namely, the extent to which the EEOC complaint named Mr. Coleman as a target of the complaint and that's an issue in this case that has been raised on summary judgment, even though not argued.

I'm going to dispense with that up front. Mr. Coleman

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was not named as a party in the EEOC complaint. His identity was revealed, but he was not named as a party. I'm going to make a finding that it's this Court's legal view that Mr. Coleman was not the employer, for EEOC purposes, that the Department of Social Services was the employer and that he was not named and there's not going to be the reverse inference to be drawn here, that is to say, that by naming the department, you also name the department director. Now, the reverse is true in the Fourth Circuit that if you sufficiently identify an individual who can be identified for employment purposes only as acting on behalf of the

department, particularly a state agency, then there's going to be attribution given to the state agency and the naming requirement would be satisfied. That's clear cut principle in the Fourth Circuit, as well as in this District. It's the functional distinction test, Harris v. Norfolk and Western Railway, 720 F.Supp 567; Alvarado v. Board of Trustees, a Fourth Circuit case; and there are cases even out of this court, Kidwell v. Sheetz, which as of yet is unpublished, but I believe it's found in 1996 Westlaw 537869 citing Bowerman v. Industrial Tower Supply, Inc., another case out of this court.

But the substantial identity or the functional equivalent test, in my view, cannot be used in reverse in this particular case, so I will recommend that Judge Michael

grant the motion for summary judgment and dismiss Coleman as a party defendant, but that doesn't end the inquiry.

The question posed here is whether the Plaintiff's evidence is sufficient to establish a prima facie case of hostile work environment, that is to say, sexual harassment.

Now, during the course of the argument in this case, the Plaintiff pointed out, and it's not lost on the Court, that none of the cases that deal with a discreet event, such as the road trip event, exclude the circumstances of the case from consideration. Harris v. Forklift Systems, 510 U.S. 17, a 1993 case; Hopkins v. Baltimore Gas and Electric, 77 F.3rd 745, a 1996 Fourth Circuit decision, and all of those with which the Court is familiar, in this Court's view, do not exclude from consideration the circumstances of the case because the test clearly is, was there an abusive environment, a pervasive risk of harassment both from an objective and subjective standpoint; that is to say, did the Plaintiff

herself perceive there to be an abusive working environment and would a reasonable trier of fact believe there to have been a pervasive hostile work environment.

Now, part of those circumstances, and I would suggest Meritor Savings Bank v. Vinson, 477 U.S. 57 certainly doesn't dispel this notion, in this Court's view. Part of that is to determine the degree to which the claimant or Plaintiff himself or herself participated because that goes

towards both things, whether the subjective element is met and whether the objective element is met and that's really what spawned the question that I asked early on of both sides and I'm sorry for doing that -- I have a knack for doing that -- and that question is, can the environment be despicable to an outsider, that is to say, an outsider who would want to have nothing to do with an employment environment like that, but be non-violative of Title 7 under the circumstances of the case. I'm convinced the cases say yes. I'm convinced that when you look at the history of Title 7 as it has been developed in the Fourth Circuit and is being developed now in the higher court, in the Supreme Court, there are circumstances that eventually, the Courts are going to let the parties live in their own -- I don't want to use a bad word -- manure, because that's exactly what this environment was.

So the question here is whether or not the circumstances of this case, a circumstance where both the Plaintiff and the Defendant have engaged in this sort of sexual innuendo, even direct sexual statements and even conduct that depicted various things that what I would say the ordinary common, decent person wouldn't want depicted in an office setting, they participated in it together and the question is whether the road trip was a sufficient straw that would break the camel's back because there's no

question in my mind that there was a lot of this vulgarity going on in the workplace.

Plaintiff argues that it doesn't matter whether this is a sexual harassment case or whether it's a quid pro quo case when you look at the circumstances of the case as a whole, which we're required to do. It could be construed as either and still survive, even though this case was progressed on the basis of harassment and still Plaintiff suggests that it's a harassment case.

The decisional authority that gives me the greatest trouble is Hopkins in the sense of not trouble because I want to decide the case one way or the other, but trouble because I'm trying to construe and apply what that case said and it's true application for this case. What the case said was that if the language or conduct is ambiguous -- and there, it was conduct -- but if what occurs, if the precipitating event is ambiguous and is subject to more than one interpretation, then the fact that the Plaintiff interprets it one way is not enough to get over the hurdle of establishing a prima facie case. That's the way I read Hopkins.

There's a problem with applying that in its full force with this case and here's where it lies. There is absolutely no testimony that either side has pointed out that would say the interpretation the Defendant wants

to argue in this case was the interpretation to be given at the time the statement was made. We have evidence about the interpretation as far as the Plaintiff is concerned at the time that it was made and the subsequent conduct of the Defendant retreating from the situation and not explaining what his interpretation was

and it concerns me that the Courts, as a matter of law, would come in and say that there interpretation that the Defendant offers here is one that the Court ought to apply as a matter of law because there's no evidence of that at the time that the statement was made. Yet there's plenty of evidence which a reasonable jury could construe that the statement "you could take a road trip and pay me back" could mean one and only one thing and that is a proposition as a culmination of what would otherwise be a sexually oriented vulgar environment.

That's this Court's both personal and professional take on it. The question then is what is the legal result that is to obtain here in light of the case law. I've struggled with this. This has not been an easy case for me because I sincerely believe that reasonable judges will differ over whether or not a case should be allowed to progress when the Plaintiff herself has participated in so much vulgar conduct. I mean, it boils down to that. It really does. Are the circumstances not pervasive in and of themselves

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because of the Plaintiff's participation and will this one event for which there is no explanation of the ambiguous statement at the time the statement was made except for one and it was made at the time it's confirmed by the conduct of the Defendant, is that enough to translate this into a harassment case, and I don't believe so. This has not proceeded as a quid pro quo case because it couldn't. There's constructive discharge in this case alleged, not active discharge, and I believe that in order to make a constructive discharge case, something more than what occurred on this occasion had to have occurred.

I believe the Fourth Circuit would say on these facts there isn't a pervasive environment sufficient enough that the Plaintiff herself hadn't participated in up to the point that this touchstone

or straw that breaks the camel's back statement was made. I think the Fourth Circuit would require more. Would that be the way I would interpret it; probably not, but I believe that's the way the Fourth Circuit would interpret it and I am duty bound to try to apply what I believe the law is in this circuit. Do I want to do that in this particular case; the answer is no because I believe sincerely that a jury ought to determine that, but I don't believe that's a result that would come out of the decisional authority of this circuit.

So I will recommend that Judge Michael grant summary

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judgment on the basis that Plaintiff has failed in this constructive discharge case to prove a prima facie case of both subjective and objective hostile or abusive work environment. That's the basis. I don't need to reach the question of whether the Defendant has established the Ellerth and Faragher defenses in this case as a matter of law. I would suggest that if the Plaintiff get over the hurdle of a prima facie case, there are also questions of fact as to the existence -- there's a question of fact as to whether or not the defense could be sustainable in this case because there are questions of fact as to the actual existence of a policy and there are questions of fact as to whether or not the policy, that is, the reporting policy and all that sort of stuff as a matter of fact failed in this case or would fail.

The recommendation of the Court will be that the motion for summary judgment be sustained on the basis that I've stated even though if I was deciding this fresh, I would come to a different conclusion.

MR. PARKER: Your honor will please note our exceptions on all point.

THE COURT: Let me just tell you what I'm going to do. I'm ordering a transcript of these proceedings. As soon as they're filed, I will render a report and recommendation in writing. You will have ten days from

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that date in order to note your objections.

MR. PARKER: Then I won't need to note them now. Thank you, sir.

THE COURT: You can pull out your baseball bat. I'm used to it.

MR. PARKER: The only thing I would remark concerning the three months to which the Court alluded in its questions was simply that she was handed an ineffective grievance policy and there was none in effect --

THE COURT: Well, there are questions of fact about that defense. So, therefore, I ruled that.

MR. PARKER: Exactly that's my point.

THE COURT: If you get over a prima facie case before Judge Michael, I believe there are questions of fact on the defenses under Faragher and Ellerth.

MR. PARKER: Thank you, sir.

THE COURT: Thank you.

(Proceeding concluded at 2:55 p.m.)

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Full Text of Constitutional provisions and statutes required by subparagraph 1(f) of U.S. Supreme Court Rule 14

42 U.S.C. § 1981a Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3 [42 U.S.C.A. 2000e-2, 20000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)], from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] (as provided in section 107(a) of the Americans with Disabilities

Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provisions of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act [42 U.S.C.A. § 12112(b)(5)], against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)], from the respondent.

(3) **Reasonable accommodation and good faith effort**

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12112(b)(5)] or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such

individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) **Compensatory and Punitive Damages**

(1) **Determination of punitive damages**

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) **Exclusions from compensatory damages**

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)].

(3) **Limitations**

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party —

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 and fewer than 501 employees in each of 20 or more weeks in the current or preceding calendar year, $300,000; and

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the available relief under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section ---

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) **Definitions**

(1) **Complaining party**

The term "complaining party" means —

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) [42 U.S.C.A. § 12111 et seq.].

(2) **Discriminatory practice**

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or violation described in paragraph (2), of subsection (a) of this section.

42 U.S.C. § 2000e. **Definitions**

For the purposes of this subchapter --

(a) The term "person" includes one or more individual, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in case under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means

any person regularly undertaking with or without compensation to procure employment for an employer or to procure for employees opportunities to work for an employer and includes an agent of such person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference or general committee, joint or system board, or council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of members of such other labor organizations) is (A) twenty-five or more during the first year after March 24, 1972, or

(B) fifteen or more thereafter, and such labor organization -

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A § 151 et seq.], or Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.];

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by another employer, except that the term "employee" shall not include any persons elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among several states; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between

points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Island, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy,

childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burden of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity

subject to section 2000e-16 of this title.

42 U.S.C. § 2000e-2. **Unlawful Employment Practices**

(a) Employer practices

It shall be an unlawful employment practice for an employer —

> (1) to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) **Employment agency practices**

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to

discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) **Lawyer organization practices**

It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion. sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive any individual employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Business or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably

necessary to the normal operations of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire or employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C ? 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if --

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earning by quantity or quality of production or to employees who work in different locations, provided that such differences are not a result of an intention to discriminate because of race, color, religion, sex, or national origin, not shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Business or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of

such business or enterprise under which preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if –

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be made as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the laws as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."

(2) A demonstration that an employment practice is required by business necessity may not be used may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substance Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Control Substance Act [21 U.S.C. ? 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) **Prohibition of discriminatory use of test scores**

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust scores of, use different cutoff scores for, or otherwise alter the results of, employment related test on the basis of race, color, religion, sex, or national origin.

(m) **Impermissible consideration of race, color, religion, sex, or national origin in employment practices**

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice

(n) **Resolution of challenges to employment practices implementing litigated or consent judgments or orders**

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the

Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may nor be challenged in a claim under the Constitution or Federal civil rights law –

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had–

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interest were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to --

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevents challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment

consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT CHARLOTTESVILLE

PATRICIA A. SMITH

v. Civil Case No. 98-0003-C

[COUNTY OF CULPEPER including]

CULPEPER COUNTY DEPARTMENT OF SOCIAL SERVICES

and

CALVIN L. COLEMAN

AFFIDAVIT OF PATRICIA A. SMITH

Patricia A. Smith, under penalty of perjury, affirms as follows:

I. I am Patricia A. Smith, the plaintiff in this case, and I make this affidavit of and from facts within my personal knowledge. I state my affidavit in the third person with like effect as if I had stated it in the first person.

II. The plaintiff, Patricia A. Smith, who is a woman, worked for the defendant Culpeper Department of Social Services until her resignation on March 14, 1997. At the time of that resignation, and at all times pertinent to this proceeding, the Department employed about 45 persons, 90% of whom, including Smith, were female. The defendant Calvin L. Coleman, a male, was at all pertinent times the Director of such Department and Smith's supervisor. Smith initially was offered part-time employment as an

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employment services worker. During Smith's tenure, Coleman promoted Smith to senior employment services worker, and later to Director of the DSS Daycare Program, which provided daycare services for working mothers, including some moving off welfare rolls. By the time of all the events complained of in this case, Smith was working under the direct supervision of Coleman.

Coleman was at least in part subject to the supervision of a local social services board. However, he was the chief executive officer of the entire local department, and the local board had delegated to him the power

> to disburse funds received from private sources for general purposes, to sign Special Welfare checks, to sign Warrant Checks, and to employ, discharge and complete evaluations of employees.

[Exhibit 2, p. 3: Minutes of the Culpeper County Board of Social Services, May 17, 1989.]

For several years, Coleman shared his office with a secretary. When the secretary left, Smith moved into Coleman's office the same day, to make room in her old office for another worker. When Smith came to occupy the same office room as

Coleman, such was not done at her request. From the time Coleman's secretary left until January of 1996 Coleman and Smith shared that room. In January 1996 Smith moved to a new office, located about one mile from Coleman's office.

As Smith knows, and as is widely acknowledged by other employees, it was common for employees of the Department, including Smith and Coleman, and particularly those working on the floor where Coleman's own office was, to use there four-letter words and,

words that had a sexual innuendo. Dirty jokes were also told. Conversation in the Department office was sometimes vulgar. Coleman, Smith and other female employees told jokes of a graphic sexual nature. On inquiry by Patricia Myers, a person who was then a Department local board member and who had personally heard the type of language used, Smith had told Myers that "that goes on all the time on our floor anyway . . . that's just the way we operate, it is a very friendly relaxed kind of place . . . . Because I share an office with Chip [Coleman], I have the occasion to hear more than others do . . . ." Smith's deposition, pp. 197-198.

Smith did not consider Coleman to be ineffectual. Smith did think that, on occasion, he was not as forceful as he should be in backing the Department's positions. She did not say he had no balls, although her having put a jar with "his balls" in it was an open joke in the office. Smith never said anything about a "blow job" as averred by Pam Riley in Riley's deposition. Coleman and Smith had never been business partners. They had engaged in a joint venture providing consulting services to other social service agencies about day care.

Smith does not believe she has "an aggressive personality". She was willing to stand up for what she believed in, and in these particulars, involving work, she was not afraid to speak her mind to Coleman.

Over the course of Smith's supervision by Coleman, he subjected her to the following:

1. On one occasion Smith wore a lace bodyshirt

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beneath a jumper and Coleman said to her "I like that, why don't you bend over". This happened while Coleman and Smith shared an office, in the office room they share, but the precise date of the comment is unknown. Smith never wore either garment again, at work or otherwise.

2. In November of 1995 Coleman offered to let Smith and her husband use Coleman's river house for the Thanksgiving holiday when Coleman and his family would be in Williamsburg. Coleman encouraged Smith to find a babysitter and leave the kids at home. Coleman suggested that Smith and her husband go alone and "fuck their brains out". Coleman said "I want to be able to smell the sex the next time I go to the river. Take along the video camera, the tripod is in the closet at the river". This occurred in the office that Coleman and Smith shared at the Culpeper DSS.

3. On a business trip to a professional conference in Suffolk in the summer or fall of 1995 Coleman, then alone with Smith in his wife's car, made several comments to Smith about stopping to check on the house at the river, as if he expected Smith to respond. He said, several times, "Maybe I should go check on the house, the river house" in circumstances where the parties were so far away from that house, and on such a route, that checking on the house at that time would otherwise have made no sense. These repeated comments scared Smith, because she understood them to raise the specter of a proposition while at the same time not being one. The comments offended Smith, but she was in no position to complain of them. She met each such comment by

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utter silence.

4. Coleman would often describe Smith, in her presence and the presence of male visitors to the Department, as his "second wife", saying, as an example, "I spend more time with her than I do Carol". In Smith's mind this would leave the visitor wondering what Coleman meant and was very embarrassing to her. The comments were always said with a smirk. In the presence of such male visitors, or with males at conferences, and often in conjunction with the last quoted comment, Coleman frequently said referring to Smith, "She'll do what it takes to get the job done". Although sometimes Smith and Coleman sometimes spoke candidly about sex and sex and marriage and marital problems, they did not do so in front of others, or in the presence of Smith's husband.

5. Coleman relayed to Smith a comment he said was made to him by the Culpeper County Commonwealth's Attorney (Gary Close): "I hear you're having an affair with Pat Smith?" When Smith asked Coleman what his response to Close had been, Coleman told Smith that he had replied, "no, I'm over her, I'm on to someone else". When Smith then asked Coleman why Gary Close would say something like that, Coleman responded "I don't know". Subsequently, Coleman told Smith about the similar Cathie Buncie/Andrew Lawson incident, recounted below. Smith was not offended by Coleman's statement about his conversation with Gary Close, but the statement did concern her. She did not want the community misunderstanding her relationship with Coleman.

6. Coleman often made comments to Smith regarding

some of Smith's subordinates, e.g.: "what a nice ass she has" (referring to Beth Wohleben); "Ooh, I like that one or I want her, she's a cutie" (referring to Susan King). These comments were made in Smith's presence in the office that Smith shared with Coleman.

7. On occasions when Smith appeared "stressed" to

Coleman, he would tell Smith "you need to get laid, you need to be taken hard and fast". These comments were made to Smith only, in the office that she shared with Coleman. Smith would either ignore these comments or make an excuse to leave the room.

8. Coleman frequently related to Smith stories of his and his wife's sexual practices. He would sometimes tell Smith that he was going home to get a "quickie" from his wife, Carol, or that Carol did this or that to him (sexually) last night. These comments were frequently made, and always in the office that Smith shared with Coleman. Although they "went in one ear and out the other", they were bothersome to Smith.

As previously alluded to, Coleman told Smith of an incident involving Andrew Lawson, a former child protective services worker at the Department. As thus told to Smith, Coleman said to Lawson, "Why don't you find/invite someone to go to the river and I'll take Cathie Buncie. We will go for the weekend."

Not long prior to February 19, 1997 Coleman had requested that Smith draw a budget for the day care program she administered, with such budget to reflect all of Smith's salary as coming from the day care program, an arrangement previously agreed to between Smith and Coleman and that constituted a radical

departure from the way Smith's salary had previously been funded.

Smith drew such a budget and submitted it to Coleman, who, prior to the meeting of the local board that was held on February 19, 1997, made no comment to Smith regarding the budget or its terms, even though at such meeting all budgets were to be discussed and acted upon.

When the budgets were submitted at the board meeting Smith found, to her consternation, that the day care budget reflected compensation for her in only half the amount which she was anticipating being paid (and had previously been paid).

After the board meeting, at which the budgets were presented, Coleman came to Smith's office and she asked him "Where is the other half of my salary coming from?; because this is not the budget that I turned in to be presented."

Coleman replied, "Well, you can take a road trip and pay me back." [Smith deposition, p. 183.]

Smith understood this comment to be a sexual proposition tied to the terms of her compensation, the meaning of such comment being that if Smith wanted all of her salary she would have to have sex with Coleman to get it. At the time of Coleman's proposition the parties were speaking seriously, and not joking. There was nothing playful about it.

The statements that Coleman made to Smith after the meeting were not innocuous. Smith responded to Coleman by calling him a son of a bitch and stating that he (Coleman) knew she was not like that. Coleman's only response was to back up and leave

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Smith's office.

Prior to this final incident Smith had never complained of any of Coleman's inappropriate conduct towards her. Except as otherwise expressly stated, she cannot remember the precise times at which the incidents other than the final one occurred. Although the incidents were neither trivial nor sporadic, and she did not consider them so, she chose instead to put up with the conduct in consideration of her friendship with Coleman and in consideration of the fact that he was not only her immediate supervisor but also the head of the Department. She still did not complain; instead, on February 28, 1997 she tendered her resignation, effective

May 30, 1997.

After the meeting at which Coleman propositioned Smith, she went to Pancho Villa's, a local restaurant, with several of her co-workers. Smith's husband joined her there. Smith's comments at Pancho Villa's, where she recounted the proposition incident in the company of several her friends and in the company of her husband Melvin Smith, were not staged. They were genuine. In the lunch there the term "going down the road" was not used by Smith, although the term "road trip" was.

In speaking of going to the General Assembly for funding, Coleman sometimes, but certainly not always, used the expression "going down the road". But he did not, so far as Smith ever observed, and she observed him much, use the expression "road trip" for this purpose. On the occasion complained of, and on other occasions, Coleman used this term to refer to trips for the

purposes of assignation.

At her deposition, when Smith was asked in the disjunctive if she had heard Coleman use the expression "taking a road trip" or "going down the road" to mean going to Richmond to get funding from the General Assembly, Smith responded affirmatively regarding "that". In fact it was the remark "going down the road", and not the remark "taking a road trip", which Smith had heard used in connection with funding.

On learning of Smith's notice of resignation, Cathy Zielinski, the chairman of the local board, had a conference with Smith on March 4, 1997. At the conference Smith told Zielinski of Coleman's proposition to her. Zielinski informed Smith that the Department had a policy against sexual harassment, and that the local board of the Department would not tolerate this type of behavior. Zielinski did not use the word "categorically". Zielinski said she was going to talk to Coleman and look into the matter, and that she would contact Smith again after she

(Zielinski) had done so. Smith requested, and Zielinski agreed, that, pending any investigation, Smith be permitted to answer only to the board and work independently of Coleman, without contact with him.

On March 7, 1997 Smith met with Zielinski and Sandra Maskas, another member of the board. Although Maskas was supportive, all that was done then was that Zielinski delivered to Smith a draft of a proposed local Department grievance procedure and told Smith that she would have to resolve her difficulties

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directly with Coleman, because Smith was going to have to continue working with him. This was a Friday.

Although Zielinski and Maskas delivered the draft grievance procedure to Smith, they did not urge her to use it. Neither did Bob Royster, who at one point spoke to Smith about her allegations, make to Smith any offer to mediate her situation with Coleman. He merely said that he would like to help in any way he could, which Smith took to be a simple statement of support.

On March 10, 1997, the Monday following her conference with Zielinski, Smith, having reviewed the draft procedure over the weekend, and being convinced that there was no effective way for her to resolve her problem directly with Coleman, or be subject to his supervision further, tendered to Zielinski a new letter of resignation, effective March 14, 1997, the forthcoming Friday. And that Friday was Smith's last day at work.

In part, Smith made her decision to leave because she knew the grievance procedure was but a draft. Smith would not have resigned had it not been for the proposition tied to her salary.

Before March 1997 ended, Patricia Smith called the federal Equal Employment Opportunity Commission to register the charge of discrimination upon which this case is founded. After a subsequent telephone interview with Smith shortly thereafter, the

EEOC itself, and not Smith, actually drew the document [Exhibit 6] forming that charge.

/s/ Patricia A. Smith

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STATE OF VIRGINIA, AT LARGE, TO-WIT:

On this the 4th day of October 1998 there did personally appear before me in Greene County, Virginia the above-subscribed Patricia A. Smith, who, being first duly sworn, did state as the truth the matter so subscribed by her.

My commission expires 7/31/2002.

/s/ Edith M. Stone
NOTARY PUBLIC

Excerpt of deposition of Calvin L. Coleman, Jr.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

PAT A. SMITH,	)	
	)	
Plaintiff,	)	
	)	CASE NO.
v.	)	98—0003—C
COUNTY OF CULPEPER,	)	
et al.,	)	
Defendants.	)	

DEPOSITION OF CALVIN LEWIS COLEMAN, JR.

May 8, 1998
9:30 a.m. — 2:50 p.m.
Stanardsville, Virginia
REPORTED BY: ROBYN M. MCLENDON

****

A. Well, anybody could be laid off.

Q. Okay. Did you ever tell her that her salary was -- had been fully funded in your proposed budget?

A. Her salary was fully funded in our proposed budget.

Q. I know. But that's not the question. Did you tell her

that?

A. I, again, don't remember. She had a copy of the budget. She was in the board meeting.

Q. The allegation here is that you told her upon inquiry by her that her salary had been budgeted and she could pay you back by taking a road trip with you.

Did you tell her that?

A. No.

Q. Now, Mr. Coleman, you would remember that part, wouldn't you? If you had told her that she could pay you back by taking a road trip with you; you would remember that part, wouldn't you?

A. (Nodded head in the affirmative)

MR. GIBNEY: You have to say yes or no.

THE WITNESS: Yes, I would remember.

****

Excerpt of deposition of Cathy Buncie

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

PATRICIA A. SMITH,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
	)	NO. 98—0003—C
v.	)	
	)	
COUNTY OF CULPEPER,	)	
CULPEPER COUNTY	)	
DEPARTMENT OF	)	
SOCIAL SERVICES	)	
and	)	
CALVIN L. COLEMAN,	)	
Defendants.	)	

DEPOSITION OF CATHY BUNCIE
May 29, 1998
3:00 p.m. - 4:16 p.m.
Stanardsville, Virginia

REPORTED BY: MICHELLE L. LONAS, RPR

****

A. No, I don't think it is common knowledge.

Q. Who was he quoting, and what did he quote?

A. He was quoting Lisa Houck, and he quoted that a woman that came into the agency on an interview, who I was interviewing, Lisa Houck -had said that, "If we hire her, she would probably come up whenever there was a problem and sit on Chip's lap and put her tits in his face."

Q. Who did he quote her to?

A. Myself.

Q. Yourself? You?

A. Me.

Q. Yeah.

Q. When was that quote made?

A. Real close time frame. It was either the end of January of 1998, or the very beginning of February, 1998.

Q. Is it -- just for the record, how do you place that in time? You seem to have a very good memory, and I find a lot of ladies that give their deposition do remember details like that, so it doesn't surprise me, but maybe you have some way of remembering.

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A. Well, in fact I do, because I was doing the interviews, and we hired in February. So I'm guessing that we did the hiring, or the interviewing, at the end of January, because the person started in February.

Q. So you, you hired people for jobs in the agency, as well as hiring -- as well as checking for people's eligibility under certain programs?

A. Well, actually, because we were hiring for an

eligibility position --

Q. I gotcha.

A. -- the eligibility supervisor asked myself and two other eligibility workers to conduct the interviews. So in that instance, yes.

Q. And who was the eligibility supervisor?

A. Melia Lambert.

Q. And what -- did you do anything as a result of that remark being made to you?

A. Yes, I did.

Q. What did you do?

A. The next morning, I went to my supervisor, and --

Q. Is that Melia Lambert or somebody else?

A. Yes, it is.

Q. Okay.

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A. And told her what had happened, told her that I wanted to have her in a meeting with myself, Mr. Coleman, and my immediate supervisor that day.

Q. And did that meeting occur?

A. Yes, it did.

Q. What else, if anything, did you tell Ms. Lambert, or

what did she say to you in response to what you said?

A. She said, "I'll talk to Chip and we'll have a meeting."

Q. And did it occur?

A. Yes.

Q. Tell me the conversation at the meeting, please.

A. The conversation at the meeting was that of my telling Mr. Coleman that I did not appreciate the way he spoke to me, and that I knew that there were other women in the agency whom he would not --

Q. Hesitate to speak to like that?

A. No.

MR. DYBING: No, let the witness finish her answer.

THE WITNESS: No. That he would not speak to in that manner because of either their age, or my idea was that he would have a little bit more

respect for them than me because they were older, or -- I don't know really.

BY MR. PARKER:

Q. Different?

A. Yes. And I told him that I did not appreciate it, and that if it continued, that we would have to do something about it. And that was the end of it.

Q. Who else, if anyone, did you tell about this remark within the next 30 or 60 days?

A. Leann Schwake.

Q. And anyone else?

A. No. Andrew Lawson.

Q. Yeah. Okay.

I was going to ask you, was the remark that you heard from Andrew Lawson, did you hear that before or after the remark that you heard from Mr. Coleman?

A. Before or after what remark?

Q. The remark of Mr. Coleman's that you heard from Andrew Lawson, which you testified to earlier, was that remark conveyed to you before or after the remark about which you complained ——

A. Before.

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Excerpt of deposition of J. Andrew Lawson

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

PATRICIA A. SMITH,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
	)	NO. 98—0003—C
v.	)	
	)	
COUNTY OF CULPEPER,	)	
CULPEPER COUNTY	)	
DEPARTMENT OF	)	
SOCIAL SERVICES	)	
and	)	
CALVIN L. COLEMAN,	)	
Defendants.	)	

DEPOSITION OF J. ANDREW LAWSON

June 2, 1998
9:30 a.m. — 10:11 a.m.
Stanardsville, Virginia

REPORTED BY: MICHELLE L. LONAS, RPR

****

was sometime while I was still at the agency -- and he had made a comment that he would like to give -- or would like me to give him Ms. Buncie for a night, at which point I indicated to him that he would have to talk to her about that. Is that what you're referring to?

Q. Yes, apparently. No doubt, information transmutes a bit as it goes from hand to hand. What I am aware of is an incident in which, while golfing with you, he was supposed to have told you to get yourself a woman and he would take Cathy Buncie, and the four of you would go to the river for a weekend. Do you remember anything like that?

A. No. What had occurred was we were golfing. He made a comment that he would, would like me to give him Ms. Buncie for a night. At which point I told him he would have to speak to Ms. Buncie about that, that he didn't need to approach me; he needed to approach her if he wanted to make any proposition. At which point he stated that he was only joking, and that was the end of the conversation.

Q. Was the first remark -- did he have to say that he was only joking for to you be sure that he was only joking?

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A. I don't know if the man was joking or not

Q. Okay. So, he didn't preface his remark with anything that would have made you for sure know that he wasn't serious?

A. Even if he was serious, I mean, that's -- I don't have control over her. Whatever she does is her business, and that's why I directed --

Q. I understand what -- I understand, but you didn't answer my question. Do you remember my question? Do you

want me to do it again?

A. Yeah, ask it again.

Q. Did he preface his remarks with anything that would make you know that they were not serious?

A. Prior to the comment?

Q. Yes, sir.

A. That was the comment that came straight up. There was nothing prior to that about — leading up to that.

Q. I understand.

A. The comment was just made. No, there was no other remarks prior to that.

Q. Was the comment made, how shall I put this, with a straight face, as if -- as we're talking

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Excerpt of deposition of Pamela Riley

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

PATRICIA A. SMITH,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
	)	NO. 98—0003—C
v.	)	
	)	
COUNTY OF CULPEPER,	)	
CULPEPER COUNTY	)	
DEPARTMENT OF	)	
SOCIAL SERVICES	)	
and	)	
CALVIN L. COLEMAN,	)	
Defendants.	)	

DEPOSITION OF PAMELA RILEY

June 2, 1998
2:30 p.m. - 3:48 p.m.
Stanardsville, Virginia

REPORTED BY: MICHELLE L. LONAS, RPR

****

A. Yes.

Q. What did he say?

A. I was being paged, and he said, "She'll be there" -- "She'll answer the phone as soon as she gets off my lap."

Q. Okay. Did he sort of shout that around?

A. Well, we was standing —— he was standing in the doorway of one of the offices, and the phone was on the other side of the room. Yeah.

Q. So it was said loud enough for everybody to hear a room or two away?

A. That wanted to hear, yeah.

Q. Huh?

A. That wanted to hear, yeah, they heard.

Q. Needless to say, you weren't sitting on his lap, were you?

A. No, sir.

Q. Could that be ascertained by everybody that heard, that you would have expected to be able to hear him? See, you know the layout there and I don't. Could that have been immediately ascertained by everybody that heard the remark?

A. Well, no, not the one that was paging me wouldn't have known that I wasn't.

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Excerpt of deposition of Gary Close

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

PATRICIA A. SMITH,	)	
	)	
plaintiff,	)	
	)	CIVIL ACTION
	)	NO. 98—0003—C
v.	)	
	)	
COUNTY OF CULPEPER,	)	
CULPEPER COUNTY	)	
DEPARTMENT OF	)	
SOCIAL SERVICES	)	
and	)	
CALVIN L. COLEMAN,	)	
Defendants.	)	

DEPOSITION OF GARY CLOSE

June 2, 1998
4:00 p.m. — 4:41 p.m.
Stanardsville, Virginia

REPORTED BY: MICHELLE L. LONAS, RPR

****

Q. Okay.

A. And I know her face and I've said hello to her. That's about it.

Q. Do you know -- the defendant in this case is Calvin Coleman. Do you know him?

A. Yes.

Q. How do you know him?

A. He's the director of Social Services.

Q. Do you know him in any other way, other than that, like socially, or to play golf with or whatever?

A. I've been to two Christmas parties that he's had, and we went down to Richmond once or twice to the General Assembly together.

Q. Okay. Mrs. Smith has given me some information. I want to check on its accuracy. The information is information that she received from Mr. Coleman herself, and it involves an incident or a -- you'll see. It involves you in a way, and I will get into it. Without predicate, I will get straight into it.

Mr. Coleman is alleged to have told Mrs. Smith, made a comment, to have told -- to have relayed —- strike that. I'll start over.

Mr. Coleman is alleged by Mrs. Smith to

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have relayed to her a comment he made to you in front of the courthouse. You are alleged by Mrs. Smith to have been alleged by Mr. Coleman to have said, "I hear you're having an affair with Pat Smith."

(Pause) Mr. Coleman is alleged to have responded, when

Mrs. Smith asked him about what he said in response, she alleges he said he said to you, in response, "No, I'm over her. I'm on to someone else."

Did any such conversation occur? My question to you is, did any such conversation occur?

A. No. I don't remember anything like that.

Q. Even if it were said in jest, do you believe you would remember such a conversation as that?

A. If it -- you mean, in other words, if he was joking, would I remember the joke?

Q. Would you remember --

A. I'd --

Q. Even if it was said in jest, do you believe you would remember such a conversation as I've just recounted my client as having said Calvin Coleman said to her?

A. I don't think so. I just -- I just

don't remember anything like that.

Q. Let me read you a statement made to me, without waiving privilege in general, Counsel, but with -- I see you nodding, but in order to make this simpler, a statement made to me by my counsel. It was made in the following context: He, Mr. Coleman, would often refer to me in front of male visitors as his second wife. Quote, "I spend more time with her than I do Carol," unquote, leaving the visitors wondering what he meant and me most embarrassed. It was always said with a smirk, quote, "She'll do what it takes to do to get the job done," unquote.

He relayed to me a comment he said the Commonwealth's Attorney, Gary Close, made to him in the courthouse. Quote, "I hear you're having an affair with Pat Smith," unquote. Coleman's response, when I asked him what he said was, "No, I'm over her. I'm on to someone else," unquote.

When I asked him why Gary Close would say something like that, he said innocently, "I don't know."

With that elucidation, was there ever such a conversation, or any one like that, between you and Calvin Coleman?

A. No.

Q. Okay.

A. I mean, I just -- I don't remember anything like that.

Q. Well, I need to pin you down whether there was such a conversation, or whether you don't remember it.

A. Well, I don't think there ever was.

Q. Yeah. Thank you. That's -- what I thought you were trying to say --

A. Yeah.

Q. -- from your reflection.

A. Yeah, I just -- I don't think so.

MR. PARKER: Can we go off the record for just a moment?

MR. DYBING: Sure.

(Discussion held off the record,

4:36 p.m. to 4:37 p.m.)

MR. PARKER: Let's go on the record.

BY MR. PARKER:

Q. Is it correct that you don't remember anything like that at all?

A. That's right.

Q. And is the nature of the conversation

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such that you believe you would at least remember some part of it if it had occurred?

A. That's a hard question to answer. I mean, I -- there are many things that go on that I, you know, that I don't remember later on. You now how it is. There's a vast amount of information and events that go through every day, and I --

Q. Have you ever -- have you ever said to Mr. Coleman, or anyone else, "I hear you are having an affair with Pat Smith"?

A. No. No. I never said that.

Q. And that's a categorical denial, is it not?

A. Right. No, I never said that. I can't even imagine how I would have heard such a thing.

Q. With that in mind, then, is it not the case that these events that Mrs. Smith recounted Mr. Coleman recounted never occurred?

A. Well, I -- all I can say is, I don't think it happened. I don't remember saying anything like that. I mean, I don't think it occurred, if that's what you're asking.

Q. Yeah.

A. Yeah. I don't think so.

Q. In particular, you are sure, are you

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not, that the remark, "I hear" -- the remark alleged by Mr. -- Mrs. Smith to have been attributed by Mr. Coleman to you, to the effect that, "I hear you're having an affair with Pat Smith," is not a remark that you made?

A. I don't think I made that remark. I don't remember ever making that remark. I don't know why I would make such a remark.

Q. Okay. You are about as sure that you didn't make that mark (sic) -- that you didn't make that remark as you are of anything that comes to you out of the blue about the past; is that correct?

A. Right.

MR. PARKER: Okay. Do you want him to read?

MR. DYBING: No.

MR. PARKER: In his case, why don't you waive?

MR. DYBING: Right. We'll waive.

MR. PARKER: All right. We'll waive. Would you waive?

THE WITNESS: Yeah.

MR. PARKER: Okay. That's fine. Do you have any questions?

MR. DYBING: No, sir. This is as

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Excerpt of the deposition of Melia Lambert

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

PATRICIA A. SMITH
vs.
COUNTY OF CULPEPER, et al.

CIVIL CASE
NO: 98—0003—C

The deposition of MELIA LAMBERT, taken at the instance of the Plaintiff, before Leslie D. Etheredge, a Registered Professional Reporter and Notary Public for the State of Virginia at Large, on June 18, 1998, beginning at 9:15 a.m.; at the Culpeper County Department of Social Services, 155 West Davis Street, Culpeper, Virginia; said deposition taken pursuant to the Rules of Civil Procedure for the United States District Courts.

INGE SNEAD & ASSOCIATES, LTD.

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A Probably, yes.

Q Did Cathy Buncie make any complaint to you of something that she either considered to be sexual harassment or that you considered to be sexual harassment, or of anything else that had sexual overtones?

A Sexual overtones, yes.

Q Okay. When did she make that complaint to you? She works for you. I believe we have established that.

A Yes, she does. It's been over a year ago. The exact date, I don't have in my mind at this point; but I know it's been over a year ago.

Q Did you write anything down whatsoever --

A Yes.

Q -- in connection with that complaint?

A Yes.

Q What did you write? Not the substance of it, but how would you describe what you wrote?

A I wrote a narrative of our meeting with Mr. Coleman, and what had happened during the meeting, what was said.

Q Where is that narrative now?

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A It is in my office.

Q Is that here in the building?

A Yes.

Q Did you write anything else in connection with the meeting, or I am sorry, did you write anything else in connection with the complaint from Cathy Buncie?

A No.

Q Was anything else written, to your knowledge, in

connection with the complaint of Cathy Buncie?

A No.

Q Did she ever write anything down or did you ask her to?

A No.

Q Did you ask her to sign anything?

A No.

Q Miss Buncie has testified in this case. She has given us in some detail what it was that she complained about. I will not trouble you to repeat what it was precisely that was said to her that caused her to complain, but I will ask you to characterize what was said in a general way and to tell me what Miss Buncie did about it.

MR. DYBING: Objection to requesting the

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witness to characterize a statement, but the witness may do so.

MR. PARKER: Fine.

Q I don't mean whether it is good or bad. What I mean by that is tell me in general terms the nature of the statement and tell me what Miss Buncie did about it.

A Okay.

Q I am trying to keep you from having to repeat the statement.

A Sure.

As I remember, Cathy requested a meeting because Chip,

Mr. Coleman, had made a remark to her that made her very angry and she requested a meeting between Mr. Coleman and myself, so that meeting was arranged probably the same day that she mentioned it.

Is that basically what you wanted to know?

Q Yes. What occurred at the meeting?

A At the meeting she told Chip what he had said to her, that she didn't appreciate it, that she felt that by his talking to her in that manner, it made her feel that he did not respect her, that she did not feel he would have said that to other workers there in the agency and, let's see, I think that was basically it from her point – that was basically what she had said regarding that situation.

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During the meeting there were other things that were discussed other than her complaint or her issue, other agency issues we discussed.

Q Did any of those have to do with sexual harassment or any like complaints, either one?

A The things that we discussed later?

Q I don't want to get into mundane business of DSS.

A That's basically what we got into later.

Q But it did not have anything to do with sexual harassment or complaints about sexual harassment –

A No.

Q – or things with sexual innuendo?

A No. The rest of the meeting did not.

Q What did you say in the meeting?

A At this meeting I was basically quiet, listening -- Cathy pretty much at this point ran the show, she was comfortable, and she -- This was a conversation actually between Mr. Coleman and Cathy where I was basically a witness, and so basically said very little other than maybe to ask what he had said.

Q Did he admit that he said what Miss Buncie said?

A Yes, he did. Yes, he did.

Q Did he admit that he -- I may be

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mistaken, and I want you to correct me if so. My memory is failing me. Did he admit that he quoted someone else in what he had said?

A He did. The statement that he had made to her, the comment that he had made to her was something someone else had said to him and he repeated to her.

Q Or that he said someone else had said to him?

A Yes.

Q Did you ever check to see if the someone else had, in fact, said what was the statement that he made to Cathy Buncie?

A No, I did not.

Q To your knowledge, were any further proceedings whatsoever had other than the meeting with Mr.Coleman?

A Not to my knowledge.

Q Where was that meeting?

A It was in this building in Miss Buncie's office.

Q Are you sure it wasn't in your office?

A No, it was in Miss Buncie's office.

Q Mr. Coleman came there?

A Yes.

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Q And you went there? Or is that in your office?

A The meeting between Mr. Coleman, Cathy and myself was in Cathy's office.

Q All right.

A Now, I may have said something incorrectly there. Cathy and I later did discuss the meeting, and at that time I asked her if she felt comfortable with the outcome of the meeting, was she satisfied, and she said that she was.

Q Okay.

A So there was actually two meetings, one without Mr. Coleman. I didn't really think of it as a meeting.

Q When you wrote the narrative, where were you?

A In my office.

Q So you did not write it while the meeting between Miss Buncie and Mr. Coleman that you attended was, in fact, going

on?

A No.

Q You had to write it afterwards, I suppose?

A Yes.

Q How much afterwards?

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A That same day, it was that same day.

Q In terms of time, how long afterwards?

A Probably within the next hour.

Q Okay. Why did you write it? Did Mr.Coleman ask that you write it?

A No, he did not.

Q Did Miss Buncie ask that you write it down?

A No, she did not.

Q Has anyone else ever asked you if such a narrative existed?

A No.

Q I am the first one to catch up with it. Is that correct?

A Yes.

Q Why did you write it? There was no procedure for writing it, so why did you do that?

A I document at different times things that I feel may be important so that -- My memory is not that good, and if I have some type of documentation, I can remember things, whether it is this type thing --

Q Sure.

A -- or whether it is a negative action with a worker.

Q Why did you think it might be necessary

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that you would have to remember it?

A Why did I feel it was necessary?

Q Yes.

A Because I knew she was angry, and I felt that if it continued, that we may need to do something differently.

Q Okay. Did you know what that something differently would be?

A Not at that time.

Q Okay.

A And I still don't actually.

Q If Cathy had said, this is a hypothetical question, Counsel will no doubt object; but as nearly as you understand what you should have done in the circumstances, if Cathy had said after the meeting with Mr. Coleman that she was not satisfied, what would you have done?

A I would have talked to someone on our Board of Directors to find out what my next step should have been.

Q If you had gone directly to a member of the Board of Directors, so to speak over Mr. Coleman's head, would you have anticipated that that might have caused you some problems?

A Caused me problems. No.

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Exhibit to Melia Lambert's deposition, comprising a memorandum

1-14-97

Cathy Buncie requested a meeting with C. Coleman and me. I told Chip she wanted a meeting and he asked what "I'd done now" - I said nothing I know of.

He wanted to meet right away - later we met in Cathy's office.

Earlier - (yesterday) he repeated a comment to her about a woman that had applied for a job here - (S.C) 'One tit on one side and one tit on the other side' - (L.H. said to him)

She told Chip she did not want him to talk to her this way. - Did not respect her - made her feel very uncomfortable. She knew he would not speak this way to others such as Amber or N.W.

Chip said he was sorry - as soon as I told him she wanted a meeting he knew what It was about - He agreed that he should not have said what he did - even repeating what LH had said to him. He told Cathy that he did respect her as a person and valued her as an employee - friend.

Cathy went on to tell him and me that she thought he showed favoritism to the people upstairs (L.H. and P.S) and things were unprofessional Dress - tardiness - children in the office. Others were not allowed the perks and she no longer cared if she came in on time - because no one seemed to care. He said he knew that things had gotten too laid back - he was noting these things him self.

He again apologized.

I said very little during meeting. Cathy was nervous but

determined and did a good job addressing the issues and Chip expected responses for his behavior.

Later Cathy and I talked without Chip present. I asked her how she felt about the meeting - was she satisfied - did she further need me to take further actions. She felt comfortable with the outcome - and promised that she would let me know immediately if there were other problems.

Excerpt of affidavit of Calvin L. Coleman, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

PATRICIA A. SMITH,

Plaintiff,

v. Civil Action No. 98-0003-C

COUNTY OF CULPEPER, et al.,

Defendants.

AFFIDAVIT OF CALVIN L. COLEMAN

Calvin L. Coleman, under penalty of perjury, affirms as follows:

1. I am Calvin L. Coleman and make this affidavit from facts within my personal knowledge.

2. I am the Director of the Culpeper County Department of Social Services, and have held that position since February 16, 1989. I report to the DSS Board, which meets monthly.

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9. When Smith submitted her February 28, 1997 letter of resignation, our DSS had not yet secured additional funding. I expected to accomplish that some time later, as the General Assembly would not vote on appropriations for several weeks. I understand that Smith alleges that I told her that she could "pay

me back" for maintaining the daycare funding by taking a "road trip" with her. Although I do not recall using those exact words, I may have said something similar, in order to state the obvious: that she might need to visit the General Assembly— or other state officials— with me in order to secure additional funding. Whatever my words, I did not intend them to be a sexual proposition, and at no time did Smith ever tell me that she understood those words to be a sexual proposition.

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Minutes of May 17, 1989 meeting of Board of Culpeper County Department of Social Services

DRAFT

THE CULPEPER COUNTY
BOARD OF SOCIAL SERVICES

BOARD MINUTES

MAY 17, 1989

The regularly scheduled meeting of the Culpeper Board of Social Services was held at the Board of Supervisors Meeting Room, Culpeper Virginia on Wednesday, May 17, 1989 at nine o'clock in the morning.

There were present:

Janet Haase - Chairman presiding
Jim Dyer
Bob Royster
Dan Rowan
Kelly Peyton
L. C. Schuermann

comprising a quorum of the board; also

Calvin Coleman, Director
F. Mellisa Johnson, Eligibility Supervisor
Andrea Miller, Social Work Supervisor

Teresa Davis, Clerk
Pat Smith, ESP Worker
William Blanton, Executive Director
for PJTA

Those board members not present:

Vincent Beasley
Janet Swan
Norman Leek

___1

Mrs. Haase called the meeting to order and after calling for any changes or additions to the agenda asked for a motion to approve the April 1989 minutes. Mr. Dyer entertained a motion to approve the minutes with Mr. Peyton seconding. The Board unanimously voted to accept the minutes as written.

Mr. Dyer made a motion to move into Executive Session, Mr. Rowan seconded and the board voted unanimously to do so.

Having come out of Executive Session it was moved by Mr. Rowan, seconded by Mr. Dyer and unanimously accepted to approve the actions — taken on cases A, B, & C as discussed in Executive Session.

PROGRAM REPORTS:

Mrs. Haase questioned whether the car expenditure was reflected in the balance of $24,000 shown on the Administrative report. Mr. Coleman stated that it was and that he would explain remaining balances by reviewing with the Board the Fiscal Year 1989 budget and expenditures. Mr. Coleman stated

that we have received $30,000 of supplemental appropriations from the state but it would not be necessary to go back to the Board of Supervisors and request additional money. There is sufficient local funds available to match state and federal funds. He stated that he would like to request State and Federal funds to match the $1800 additional local funds our agency has left. He stated that the State budget was supposed to be out in mid—June. Mr. Coleman informed the board that the position of an additional Eligibility Worker was approved.

Mrs. Johnson briefed the Board on the status of applications stating that food stamps had dropped slightly because of the economy naming the mild winter as the cause.

NEW BUSINESS:

Mr. Willie Blanton, Executive Director for the Piedmont Job Training Administration gave a summary to the Board regarding his program. He stated that the program had been revised to include much more involvement between their system and the social service system to ensure that our clients would be offered a training program preparing them for work.

Pat Smith, ESP worker for the agency, talked briefly to the board and updated them on the efforts she has made in working with ESP clients and also of her progress . She stated that a major problem was transportation and she was working on ways to remedy this. It was suggested that we incorporate volunteers to transport these clients. Mr. Coleman asked that the Board consent to Mrs. Smith continuing her work with Mr. Blanton in order to develop a coordinated Jobs Training Program in Culpeper. It was the consensus of the Board to continue to pursue this.

Mr. Coleman asked that item C (Home Based Care) be deleted and replaced with Guardianship. He stated that the agency had 4 clients this month that need a guardian. Mr. Coleman does not feel that the agency should act as a guardian but needs to resolve this problem. It was suggested that articles be run in the local papers discussing this issue and to perhaps approach the Bar Association and local Judges as to how to resolve this matter.

Some discussion was held regarding possible group homes for those persons who were not capable of functioning on their own but who were able to do some daily life activities with little supervision. Mr. Rowan stated that Culpeper County already had a group home.

VOLUNTEER PROGRAM:

Mr. Coleman stated that Mr. Hill was involved with training programs for the volunteer program and that the agency was putting together a packet of information pertaining to volunteer workers.

Mr. Coleman stated that the commodity distribution was set for June 6, 1989 and that a Health Fair would also be available to screen for glaucoma (Society to Prevent Blindness), cholesterol and blood pressure (local health department). He stated that the Lions Club would be paying $3.00 per screening for the cholesterol test and the use of the machine.

MOVING EXPENSES:

Mr. Coleman informed the board that he had obtained several bids for moving expenses he may occur. These bids ranged from $2,500 to $3,700. He stated that he is working with the

lowest bidder and hopes to reduce the cost to about $2,300. Mrs. Haase is to check with Mr. Beasley as to who is supposed to cover the moving costs (agency or county) and inform Mr. Coleman as to the outcome.

Mr. Coleman stated that on May 31, 1989 at 7:00 p.m. a Public Hearing would be held on the counties fiscal year 90 budget.

OFFICE RENOVATION:

Mr. Coleman stated that Project 1 (front office) and Project 3 (upstairs office) had been started. Mr. Coleman stated that he would be asking $16,000 from the State and $4,000 from the county to continue renovation plans for the office. It was the consensus of the Board that this would be appropriate action for Mr. Coleman to pursue.

A motion was made by Mr.Dyer that we reestablish the reorganization and building improvement committee and let those people be conferees with Mr. Coleman before he makes a purchase regarding a computer, a car and agency improvements. It was determined that Mrs. Haase, Mr. Dyer and Mr. Peyton would serve on this

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committee. This motion was seconded by Mr. Royster and unanimously accepted.

A motion was made by Mr. Dyer, seconded by Mr. Royster and unanimously accepted to give Mr. Coleman the power to spend any remaining monies left over at the end of the year regarding the purchase of a car, a computer and agency improvements.

DIRECTORS MEASURABLE GOALS AND OBJECTIVES

Mr. Royster shared with the Board members the objectives and goals the committee developed for Mr. Coleman. The goals and objectives were adopted per a motion made by Mr. Dyer and seconded by Mr. Rowan. This motion passed with Mr. Schuermann abstaining.

It was the consensus of the Board that these objectives and goals be reviewed in six months with Mr. Coleman and that changes be implemented annually.

A motion was made by Mr. Royster, seconded by Mr. Dyer to give Mr. Coleman the boards approval on giving him delegated authority to disburse funds received from private sources for general purposes, to sign Special Welfare Checks, to sign Warrant Checks, and to employ, discharge and complete evaluations of employees. This motion was passed with Mr. Schuermann abstaining.

There being no further information or discussion to come before the Board the meeting was adjourned by Mrs. Haase.

/s/ Janet Haase
Chairman

Attest: /s/ Calvin Coleman
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COMMONWEALTH OF VIRGINIA

DEPARTMENT OF SOCIAL SERVICES

DATE: June 24, 1996

TO: Local Directors of Social Services Departments

FROM: Harold Hobson, Employee Relations Manager

EMPLOYEE GRIEVANCE PROCEDURE

In a memorandum dated June 7, 1996, Phyllis C. Katz, Director of the Department of Employee Relations Counselors, advised you that during the 1996 session of the General Assembly significant changes were made to the grievance procedure that becomes effective July 1, 1996.

We have had a number of questions concerning Ms. Katz's memorandum and its impact on grievances at local social services departments. We have talked with representatives from her office, and the purpose of this memorandum is to try to address some of your questions and concerns.

1. All local social service departments will be required to provide their employees with a grievance procedure.

2. Local social service employees may be included in a local governing body's grievance procedure or a grievance procedure established and administered by the local board or department.

3. Newly established grievance procedures will have to be

approved by the Department of Employee Relations Counselors.

4. If a local social service department fails to provide their employees with a grievance procedure as required by July 1, 1996, that agency could face court action should a grievant contest the matter in courts.

5. If the local social service department has not been accepted in the local governing body's grievance procedure or established and had certified a procedure to be administered by the local board or department, we would recommend that until one of the latter occurs that the local agency adopt the state procedure and designate it to be administered locally.

6. All grievances initiated prior to July 1, 1996 would continue until concluded under the existing procedure.

Attached is a copy of Senate Bill 467 and House Bill 1036 as approved by the General Assembly. Also attached is a draft format that may be used for writing a grievance procedure. This format should meet all the requirements DERC has for approving your grievance procedures, since it was written by them.

If you have any additional questions concerning this matter, I may be reached by telephone at (804) 692-1554.

Attachments

COMMONWEALTH OF VIRGINIA

Department of Employee Relations Counselors
1313 East Main Street, Suite 305
Richmond, Virginia 23219-3600
June 24, 1996

Memorandum

TO: Harold Hobson, Department of Social Services
Bennett Nelson, Department of Mental Health, Mental Retardation and Substance Abuse

FROM: Phyllis C. Katz,
Director, Department of Employee Relations Counselors

Re: Grievance Procedure

I have enclosed a copy of the State's *Employee Grievance Procedure* which has been adapted to conform to the statutory changes effective July 1, 1996. I am providing it to you for your distribution to the Departments of Social Services or Community Services Boards.

The departments may make further modifications as follows:

A. Delete:

1. References to mediation.

2. Miscellaneous Provisions on page 11.

B. Augment to reflect the agency's organization:

1. Define agency head in definition section.

2. Provide either an organizational chart for grievances or insert under the second and third steps the positions which will serve as the second and third step respondents.

3. Designate a board member to make the qualification decision if the Director is the immediate supervisor of the grievant.

4. Include under the Miscellaneous Provisions the agency's rules on leave, compensation, use of office equipment.

If they decide to write their own grievance procedure, it will need to be submitted to DERC for approval (see § 2.1-116.010(iii)). To obtain approval, the procedure cannot divest the grievant of rights currently afforded under the state grievance procedure.

I have enclosed Forms A as well. The departments may wish to include them in the grievance procedure distributed to employees.

Please enclose this letter when distributing the procedures to the departments.

PCK:ew
Enclosures

FACTS PERTINENT TO THE DEPARTMENT'S DRAFT GRIEVANCE PROCEDURE

Prior to July of 1996, the local Department utilized the state grievance procedure, contained in chapter 10.01 of title 2.1 of the Code of Virginia. But, effective with July of 1996, the Virginia General Assembly had changed that, insofar as the employees of local departments of social services were concerned. By an amendment to section 15.1-7.2-A-4 of the Code, the General Assembly removed local departments of social services from coverage under the state grievance procedure and required that such departments either adopt the procedure of the local governing body or develop their own procedure. [Va. Code Ann., § 15.1-7.2, 1996 Cum. Supp. to vol. 3A, note for the 1996 amendments, lines 9 et seq. on page 17.] But, despite the fact that the Culpeper County Department of Social Services understood at all pertinent times that the State grievance procedure was no longer applicable to it [see App 398-400 and 403], the Department did not enact a procedure applicable to those in Smith's position until April 16, 1997 at the earliest. This, of course, was well after Coleman's conduct of February 19, 1997 and Smith's resignation of March 10, 1996 that was effective March 14, 1996 [A-66]. As far back as about June 24, 1996 the local Department had been warned, by the State Department of Employee Relations Counselors, through the State Department of Social Services [A-106-109], that if it failed to act promptly to enact a grievance procedure, it "could face court action" [A-107]. And Coleman himself had pointed out to the local board, on February 19, 1997, at the very same board meeting at which the Smith's budget was discussed, that the Department had been advised that it could no longer remain under the state procedures, and the board had voted to have DSS develop its own procedures.

Supreme Court, U.S.
FILED
JAN 6 2000
CLERK

No. 99-987

In The Supreme Court of the United States

PATRICIA A. SMITH,
Petitioner,

v.

COUNTY OF CULPEPER;
CULPEPER COUNTY DEPARTMENT
OF SOCIAL SERVICES;

and

CALVIN L. COLEMAN,
Respondents.

On Petition for *Writ* of *Certiorari* to the
United States Court of Appeals for the
Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR *WRIT* OF *CERTIORARI*

ROBERT A. DYBING, VSB #32712
Counsel of Record
JOHN A. GIBNEY, JR., VSB #15754
SHUFORD, RUBIN & GIBNEY, P.C.
Post Office Box 675
700 Building, Suite 1250
Richmond, Virginia 23218
(804) 648-4442

Counsel for Respondents

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

20pp

QUESTIONS PRESENTED

1. Whether Appellee Calvin Coleman ("Coleman") may be individually liable under Title VII.

2. Whether Appellant Patricia Smith ("Smith") established a claim of quid pro quo sexual harassment.

3. Whether the conduct about which Smith complained was sufficiently "severe and pervasive" as to amount to hostile environment sexual harassment.

4. Whether Smith was constructively discharged.

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PARTIES TO THE PROCEEDING

The Appellees do not disagree with the Appellant's statement of parties to the proceeding.

REFERENCES TO REPORTS OF THIS CASE

The Appellees do not disagree with the Appellant's statement of references to reports of this case.

JURISDICTION OF THIS COURT

The Appellees do not disagree with the Appellant's statement of federal jurisdiction of this Court. However, the issues raised in the Petition do not qualify under any of the circumstances set forth in Rule 10 of the Supreme Court of the United States governing issuance of petitions for certiorari. As discussed infra, all circuit courts deciding the issue agree that there is no individual liability under Title VII. Moreover, the gravamen of the Petition is that the District Court and the U. S. Court of Appeals for the Fourth Circuit erred in finding that the facts adduced by the plaintiff did not amount to hostile environment sexual harassment. Alleged erroneous factual

findings are beyond the normal scope of this Court's review. See Rule 10.

EXCERPTS FROM CONSTITUTIONAL PROVISIONS AND STATUTES

The Appellees do not disagree with the Appellant's excerpts from constitutional provisions and statutes.

STATEMENT OF THE CASE

The Statement of the Case set forth in the Petition is misleading in four respects:

First, prior to the "road trip" comment, Smith did not find her work environment "borderline abusive" because of frequent use of sexual innuendo and offensive language by Coleman. Petition at 26. Rather, Smith herself commonly used four-letter words, sexual innuendo, and told dirty jokes. JA 135-36. Coleman and Smith both told jokes of a graphic sexual nature. JA 146-47. When an acquaintance of Smith's asked her about foul language, dirty jokes, and inappropriate comments being common at DSS, Smith replied, "that goes on

all the time on our floor any way . . . that's just the way we operate, it is a very friendly relaxed kind of place. . . ." JA 188-89. Thus, Smith associated such remarks not with an offensive workplace, but with a friendly and relaxed workplace.

Second, the theory of the Petition is that the "road trip" comment was some sort of "culminating event" in a course of conduct to which Smith objected. Nothing could be further from the truth. Smith flatly conceded that all of the incidents preceding the "road trip" comment, see Petition, pp. 4-7, were simply routine sex-oriented jokes and byplay that everyone in the DSS office engaged in.

> Q. Is it fair to say that before the February 19th road trip comment, that all the other stuff falls under the heading of the kind of sex-oriented jokes and byplay that happened in the DSS office that everybody engaged in, including you?
>
> A. I did, in fact, engage in that, and I would never admit to anything other than that. It did go on all the time, and I was party to a lot of it and yes, most of it was always done in a playful nature. . . .

JA 169. Repeating that point, Smith testified that prior to the "road trip" comment, she and Coleman "worked together and on a very friendly basis, and I didn't have a problem with it . . ." JA 128.

Third, Smith knew that a "road trip" meant getting funding for DSS programs.[1] Consequently, her complaint about the "road trip" comment being a proposition rests on the words being used as double entendre. Asked if she had heard Coleman use the phrases "taking a road trip" or "going down the road" to mean going to Richmond to get funding from the State government, Smith agreed that "I am sure that I have heard Chip [Coleman] say that as a follow-up or a comment, a

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[1]One of Coleman's duties was to obtain funding for DSS programs. He did this by "going down the road," from Culpeper to Richmond, to meet with State Social Services officials and with members of the General Assembly. Several of Smith's co-workers (and the former Culpeper County Administrator) knew Coleman to use the expressions "road trip" or "going down the road" to mean getting funding from Richmond. JA 297-298, 306, 318, 319.

side comment to talking about finances in relation to the General Assembly." JA 178-79. Indeed, Smith testified with crystal clarity that it was not the words, but the "tone" of Coleman's remark and that it was made with a "little smirk" that made her uncomfortable:

> But at the time the statement was made to me by [Coleman], it was said in a way that made me uncomfortable, it was the — Let me think of the word. I believe it was the tone in which it was said to me, the little smirk that he had at the time it was said that made it different from saying well, we'll go to the General Assembly and find the funds or don't worry, the budget process is not over yet.

JA 124 (emphasis supplied). Thus, Smith knew that Coleman's remark—absent the "tone," and absent the "smirk"—meant going to the General Assembly for funding. Hence, this lawsuit boils down to whether one remark about a "road trip" made with a "tone" and a "smirk" amounts to hostile environment sexual harassment.

Fourth, belying her claim of constructive discharge, Smith testified that what she now claims to be sexual

harassment was one of many reasons for her resignation, having told DSS Board Chairperson Cathy Zielinski "that I had had enough and I was tired of the bulls--t that went on every day." JA 181-82. The colorful noun referred to political disputes between DSS and Culpeper County. Id. Moreover, when Smith resigned on February 28, 1997, she said that her last day of work would be May 30, 1997, fully three months in the future. JA 193. Smith explained that May 30th was the end of the fiscal year for DSS, and she felt that it would be easier for Coleman if she stayed until the end of the fiscal year. JA 108-109.

ARGUMENT

STANDARD OF REVIEW

The Appellees agree with the standard of review set forth by the Appellant.

DISCUSSION

A. Coleman is Not Liable Under Title VII.

Coleman, in his individual capacity, is not liable under

Title VII, as all circuit courts of appeal to have considered the issue have ruled. See Lissau v. Southern Food Svces. Inc., 159 F.3d 177, 180 (4th Cir. 1998), and cases cited therein. Smith errs by contending that the use of the word "agent" in 42 U.S.C. § 2000(e)(b) bespeaks Congressional intent to hold individual supervisors liable. Instead, the word "agent" means merely that the conduct of an employer's agent may suffice to hold the employer liable, under traditional principles of respondeat superior.

B. No Quid Pro Quo Sexual Harassment.

Because Coleman never reduced Smith's salary, demoted her, or otherwise adversely affected the economic terms of her employment, she has failed to establish a prima facie case of quid pro quo sexual harassment as a matter of law. See Burlington Industries v. Ellerth, 118 S. Ct. 2257, 2264-65 (1998)("Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim. . ."). Of course, in the case at bar, there was no threat at

all, merely the "road trip" remark that was, at worst, a double entendre.

C. No Hostile Environment Sexual Harassment.

Smith cannot prove that the alleged harassment was sufficiently severe and pervasive to create an abusive working environment. See Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 370 (1993), holding that conduct that is not "severe and pervasive enough to create an objectively hostile . . . work environment . . . is beyond Title VII's purview." That holding is in accord with Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405 (1986), holding that conduct amounts to actionable sexual harassment only when it is sufficiently pervasive and severe to alter the conditions of the victim's employment and create an abusive working environment.

Indeed, aside from the ambiguous "road trip" comment, Smith admitted that none of the other comments that she attributes to Coleman offended her enough to complain about them. Prior to the "road trip" remark, Smith "worked together

[with Coleman] and on a very friendly basis, and I didn't have a problem with it." JA 128.

To establish a Title VII claim based on hostile environment, a plaintiff must show that the environment was "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2283 (1998). The Court must "examine the totality of the circumstances," including (i) the frequency of the discriminatory conduct; (ii) its severity; (iii) whether it is physically threatening or humiliating, or a mere offensive utterance; and (iv) whether it unreasonably interferes with an employees' work performance. Harris, 114 S. Ct. at 371. Moreover, to be actionable, the environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the alleged victim did in fact perceive to be so. Id. It hardly bears arguing that a reasonable person would not believe her working

environment to be hostile, that the terms and conditions of her employment had been altered, based solely on one remark, regardless of its "tone" or whether it was said with a "smirk."

Reviewing the applicable Harris criteria: (i) the "road trip" comment was infrequent— in fact it was completely isolated, as Smith conceded that Coleman had never propositioned her before, JA 125; (ii) the remark was plainly not "severe," because Smith testified that it was not the words—which meant getting funding—but the "tone" and the "smirk" that made her uncomfortable; (iii) the "tone" and "smirk" were not physically threatening or humiliating; instead, they were at most, using the diction of Harris, "offensive utterances;" and (iv) although Smith alleges that the "tone" and "smirk" made her uncomfortable, those circumstances— an inflection and a facial expression—did not unreasonably interfere with Smith's work performance, because a reasonable employee, confronted with otherwise innocent remark made with a certain "tone" or "smirk," would not find that her work

environment had suddenly become hostile and abusive— the objective component of the test.

Moreover, the context in which Coleman's "road trip" remark was made was replete with graphic sexual discussions, and sex-oriented jokes and byplay to which Smith was a willing participant. Against that background, an innocent remark made with a "tone" and a "smirk" cannot possibly amount to a change in the terms and conditions of Smith's employment.

Title VII was not designed to create a federal remedy for all offensive language and conduct in the workplace, and does not attempt to "purge the workplace of vulgarity." Baskerville v. Culligan Int'l. Co., 50 F.3d 428, 430 (7th Cir. 1995). This sensible observation is doubly true when the plaintiff herself actively participated in discussions involving graphic sexual remarks and four-letter words. See e.g., Reed v. Shepard, 939 F.2d 484, 491 (7th Cir. 1991)(plaintiff who engaged in inappropriate remarks did not experience hostile

environment).

D. No Constructive Discharge.

Smith's resignation was not a constructive discharge. Constructive discharge requires proof of two elements: deliberateness of the employer's action, and intolerability of working conditions. Blistein v. St. John's College, 74 F.3d 1459 (4th Cir. 1996); Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), cert. denied, 475 U.S. 1082 (1986); Paroline v. Unisys Corp., 879 F.2d 100, 113-14 (4th Cir. 1989)(Wilkinson, J. dissenting), adopted by 900 F.2d 27 (4th Cir. 1990)(en banc). Intolerability is assessed by the objective standard of whether a reasonable person in Smith's position would have felt compelled to resign, that there was no choice but to resign. Bristow, 770 F.2d at 1255. This is essentially the same standard applied by the NLRB. See Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 894 (1984)(constructive discharge occurs when employer "purposefully creates working conditions so intolerable that the employee has no option but to resign").

Smith cannot satisfy that standard. First, Smith's resignation letter gave three months' notice. JA 193. That fact alone negates any claim that her workplace was "intolerable." See Smith v. Bath Iron Works Corp., 943 F.2d 164, 167 (1st Cir. 1991)(constructive discharge requires that employee resign within a reasonable time after workplace becomes intolerable). It offends logic to suggest that an "intolerable" workplace may be tolerated for three months, especially since Smith testified that her reason for giving three months' notice was because it would be easier for Coleman if she stayed until the end of the fiscal year. After Smith changed her mind, and decided to quit on one week's notice, that was not the result of changed conditions that suddenly rendered her workplace intolerable. Finally, Smith testified that what she now claims to be sexual harassment was one of many reasons for her resignation, having told DSS Board Chair Zielinski "that I had had enough

and I was tired of the bulls--t that went on every day," referring to inter-agency politics. JA 181-82.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

CALVIN L. COLEMAN
CULPEPER DEPARTMENT OF
SOCIAL SERVICES

By: _____
Counsel

Robert A. Dybing, VSB# 32712
Counsel of Record
John A. Gibney, Jr., VSB# 15754
Shuford, Rubin & Gibney, P.C.
P.O. Box 675
Suite 1250, 700 Building
Richmond, Virginia 23218
(804) 648-4442
Attorneys for Respondents